No. 16013

IN THE

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

ABC PACKARD, INC.

Appellant,

vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

HOLMAN, MICKELWAIT, MARION,
BLACK & PERKINS
J. PAUL COIE
1006 Hoge Building
Seattle 4, Washington

HENRY M. HOGAN
DANIEL BOONE
E. J. MCGRATTY, JR.
3044 West Grand Boulevard
Detroit 2, Michigan
Attorneys for Appellee.

FRAYN LETTERPRESS

No. 16013

IN THE

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

ABC PACKARD, INC.

Appellant,

VS.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

HOLMAN, MICKELWAIT, MARION,
BLACK & PERKINS
J. PAUL COIE
1006 Hoge Building
Seattle 4, Washington

HENRY M. HOGAN
DANIEL BOONE
E. J. MCGRATTY, JR.
3044 West Grand Boulevard
Detroit 2, Michigan
Attorneys for Appellee.

FRAYN LETTERPRESS

INDEX

INDEX (Continued)

TABLE OF CASES

TABLE OF CASES (Continued)

TEXTS

RULES

No. 16013

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

ABC PACKARD, INC.

Appellant,

VS.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

PRELIMINARY

This is an appeal from a judgment entered upon a jury verdict in favor of the appellee, General Motors Corporation, in a fraud action brought by appellant, A. B. C. Packard, Inc., formerly called Anderson Buick Company, in the United States District Court for the Western District of Washington, Northern Division.

The Proceedings Below

The case was tried before Honorable Sylvester J. Ryan, Senior Judge of the United States District Court for the Southern District of New York, sitting by assignment, and a jury.

The Court's charge to the jury was prepared with extreme care over an extended period of days and in consultation with counsel for the parties (Tr. Vol. VI, p. 2238). Counsel for both parties were in complete agreement with the entire charge, as finally given to the jury, with the exception of those points to which they took specific and formal exception (Tr. Vol. VI, pp. 2238-56; 2428-30).

The jury returned a general verdict in favor of appellee and answers to interrogatories submitted to it by the Court (Tr. Vol. II, pp. 500-503, Vol. VI, p. 2457).

After entry of the verdict, the Court stated that the verdict was in accord with the Court's own views and read to the jury an opinion prepared in connection with appellee's motion for a directed verdict, upon which decision had been reserved. (Tr. Vol. VI, pp. 2468-79; 154 F. Supp. 927).

On September 4, 1957 appellant filed a motion for a new trial. The motion was submitted, without oral argument, on the comprehensive briefs of the parties. The Court's opinion, denying the motion (161 F. Supp. 668) appears at pages 504-25, of Volume II, of the record.

STATEMENT OF FACTS

A. Appellant's "Statement of the Case" Is Not To Be Relied Upon and Is Controverted by the Appellee

The appellant's "Statement of the Case" (Br. pp. 3-38) is little more than a thinly disguised argument that the verdict was against the weight of the evidence.

At the outset, appellant states that its appeal is

not on the facts and that only questions of law are presented and that appellant proposes to rely upon uncontroverted facts.

Appellant further states (Br. p. 4):

> "We propose to rely primarily upon uncontroverted facts, which we believe will demonstrate an extremely close and dependent relationship * * *. This relationship can be shown we believe, through the testimony of General Motors' own officers and employees."

What follows is a 40-page paraphrase of appellant's argument to the jury in which appellant construes all evidence in the light most favorable to it, draws all inferences in its favor, resolves all issues of fact in its favor, ignores all embarrassing aspects of its own case, and disregards the appellee's evidence in its entirety, except that isolated fragments of testimony are seized upon and sought to be construed as "admissions."

Far from relying on "the testimony of General Motors' own officers and employees", the record citations made in support of appellant's assertions refer, in the overwhelming majority of instances, to the virtually uncorroborated testimony of Mr. M. O. Anderson, president of the appellant corporation. Mr. Anderson's testimony was sharply controverted in every material particular by the contemporaneous documents in evidence and by the testimony of appellee's witnesses.

The fundamental error that pervades appellant's statement of the case is that appellant refuses to recognize or to accept the decision of the jury that it did not believe Mr. Anderson or his witnesses on the absolutely fundamental issues of this case, and

that it did believe appellee's witnesses and the documentary proof.

To display to this Court the entire area of the conflict in the trial testimony or even to show in full the testimony conflicting with the testimony referred to under the various rubrics of appellant's statement of the case would require a brief of inordinate length. We propose, in the interest of brevity, to set forth a short Statement of Facts as the jury were entitled to and did find them, and then point out (*infra,* pp. 14-37) some of the more glaring examples of omission and distortion of evidence which are to be found in appellant's statement of the "uncontroverted facts" allegedly taken from the "testimony of General Motors' own officers and employees."

B. Statement of Facts

1. ***Historical Distribution System in Automobile Industry***

In the early days of the automobile industry the conventional method of distribution was through wholesale dealer-distributors located in the larger population centers. The dealer-distributors purchased automobiles from the manufacturers in quantity lots sufficient to supply the demand of their own retail customers and also the needs of the local automobile dealers located in the dealer-distributor's territory. On the wholesale transactions the dealer-distributor was given a small fixed "override" which in the case of Buick amounted to between $35 and $50 on each car distributed to a retailer, as compensation for the wholesale function (Tr. Vol. V, pp. 1905-06, 1860).

In the 1930s as the market expanded it became apparent that the wholesale function of the dealer-distributors was an economic luxury and that the manufacturers themselves could distribute more effectively and economically directly to the retail dealers. This elimination of the middleman in the distribution pattern became a trend in the late 1930s.

Following the war, the trend was resumed and during the 1940s wholesale distribution direct to dealers was undertaken entirely by Studebaker, Nash, Packard, Chrysler and by Pontiac Division of General Motors, and partially by Cadillac and Buick Divisions of General Motors.

In the early 1950s, Buick Division changed to direct distribution throughout the country with the exception of Saginaw, Michigan.[1]

(Def. Exs. A-52, A-53, A-54, A-55, A-56, A-57, A-58, A-59, A-60, A-61, A-62, A-63, A-64; Tr. Vol. V, pp. 1859, 1877-1907; Pl. Ex. 81, Tr. Vol. III, pp. 1069-74; Pl. Ex. 8, Tr. Vol. II, pp. 658-60).

There were many reasons for the elimination of the dealer-distributor as a middleman between the local retail dealers and the factories. With the growth of volume, dealers' profits expanded to the point that they became financially independent and they were able to operate their businesses without the assistance that had been given to them in the early days by the distributors. From the dealers'

---

[1]From the outset appellant conceded that General Motors had the "legal right to change its distribution pattern"; that such change "is not deemed actionable" and that "General Motors may distribute its products as it sees fit so long as its policies do not conflict with the public interest." (Tr. Vol. II, p. 506.)

standpoint, the distributors were simply no longer needed. (Tr. Vol. V, p. 1905).

From the manufacturer's standpoint, it was found that the expanded market could be best and most economically served, from the standpoint of service to the retail customer, by a system that permitted direct dealing with the retail outlets. (Tr. Vol. VI, pp. 2096-97).

Mr. Hufstader, Vice President of General Motors in charge of distribution, described the manufacturer's viewpoint (Tr. Vol. V, p. 1906).

2. *The establishment of Anderson Buick Company*

(a) *Background*

M. O. Anderson, president of appellant corporation, entered the automobile business in 1928 at Spokane, Washington, as a retail car salesman and was thereafter continually engaged in the automobile business. For a period of several years he was employed by appellee as a Zone Manager of one of its car divisions, and served in several executive capacities with the Motor Holding Division of General Motors (Tr. Vol. III, pp. 825-33).

Prior to 1936, Buick Motor Division distributed its products in Washington through Eldredge Buick Company, a large dealer-distributor located in Seattle. In 1936, Eldredge retired and it was decided to establish several small dealer-distributorships to serve the territory, one of which was to be located in Seattle.

Mr. W. F. Hufstader, Sales Manager of Buick, called Anderson on the telephone and offered the Seattle contract to him. Later Anderson called

Hufstader back and told him that he wished to accept the offer (Tr. Vol. V, pp. 1855-56).

Mr. Anderson then made application to the Motor Holding Division of General Motors for financial help and the Anderson Buick Company was formed under a plan designed by General Motors to assist qualified individuals to become automobile dealers. General Motors contributed $67,500 of the capital and received the Class A stock of the corporation; Mr. Anderson contributed $7,500 and received the Class B stock. The parties then entered into an agreement under which Mr. Anderson agreed to purchase the Class A stock held by General Motors out of the earnings of the business (Tr. Vol. III, pp. 837, 846-48).

The Buick Division of General Motors then entered into a dealer-distributor selling agreement with Anderson Buick Company for the Seattle area (Def. Ex. A-6, Tr. Vol. IV, pp. 1173-77).

By October 31, 1940, Anderson Buick Company had purchased all of the Class A stock held by Motor Holding Division and on that date the corporation was dissolved and the business operated thereafter as a sole proprietorship of M. O. Anderson (Tr. Vol. III, p. 847).

Early in 1942, Mr. Anderson again applied to Motor Holding Division for a capital contribution. On March 30, 1942, Anderson Buick Company was again organized and M. O. Anderson and Motor Holding Division each contributed $30,000 under an arrangement identical in all material respects with the 1936 arrangement (Tr. Vol. III, pp. 850-52).

By December 31, 1945, Anderson had purchased

all of the shares held by Motor Holding Division and he thereupon became the sole stockholder of Anderson Buick Company and General Motors has not since that date owned any of the shares of its stock, had any other financial interest in that Company or any representation in its management (Tr. Vol. III, pp. 852-53).

(b) *The Contracts*

During the entire period of appellant's operation, the relationship between the parties was governed by written contracts which were identical in all respects with the contracts of all other Buick distributors in the United States. These contracts spelled out in detail the rights and obligations of each of the parties (Def. Exs. A-6 to A-17, Tr. Vol. IV, pp. 1172-73; Def. Ex. A-29, Tr. Vol. IV, p. 1264).

A copy of the last contract entered into between the parties appears at pages 52-98 of Volume I of the record.

Although appellant contended that these contracts were entered into as a result of business compulsion and were induced by fraud, the jury has specifically found that each was entered into as the free act of the parties, none was executed as a result of "business compulsion", and none was tainted by fraud of any kind (Tr. Vol. II, pp. 502-03).

Many of the elements in the relationship between the parties, which appellant now labels "control devices" used by appellee to dominate and control the appellant's business (Br. pp. 8-18), are to be found in the express undertakings of these agreements.

After 1947, each agreement was for a stated term

of one year and each was cancellable by the distributor on 30 days' notice without cause; and cancellable by the manufacturer on 90 days' notice if the distributor failed to meet the operating requirements of the contract, and immediately if the distributor died or became insolvent (Tr. Vol. I, pp. 53, 83-86).

The agreements further provided that the distributor was not the agent or legal representative of the manufacturer for any purpose whatever; that the distributor was solely responsible for obligations and liabilities incurred in the performance of the contract unless the manufacturer agreed to assume such obligations by written agreement executed by its General Manager or General Sales Manager (Tr. Vol. I, p. 95); and that there were no other agreements or understandings, either oral or in writing, between the parties relating to the sale or servicing of Buick motor vehicles (Tr. Vol. I, p. 97).

In commenting on these contracts, the Trial Court, after recording the jury's verdict, said (Tr. Vol. VI, pp. 2474-75):

> "The compulsive force of these agreements and of the action of the parties under them leads the Court to conclude as a matter of law that the relationship between the parties was not such as placed defendant in a position of superiority and influence where it controlled the action and decision of the plaintiff and created a relationship of trust and confidence which impelled the disclosure of any policy which indicated the ultimate and certain discontinuance at an indefinite date in the future of plaintiff's distributorship.
>
> "This is especially so when considered in light

of the provisions, repeated through the years, which granted plaintiff the right to cease to continue as distributor at any time, for [no] cause, upon thirty days notice. No relationship of trust and confidence existed as a matter of law.

"The Court will assume arguendo that such a relationship of trust and confidence did, nevertheless, exist.

"The agreements lead irresistibly to the conclusion as a matter of law that plaintiff cannot maintain that it took action in ignorance of an undisclosed policy which it would not have taken had the policy been disclosed or known to it. In this consideration, we do not weigh the plaintiff's long years of active experience in the automobile industry, his active participation on trade associations or his wide reading of trade publications. We are, nevertheless, led to these conclusions by reason of the repeated inclusion throughout the years of provisions of time limitation upon the term of the distributorship; by the provisions that the agreements contain and embody all the understandings between the parties, by the provision limiting authority to modify to defendant's two specified officers; and by the consistently manifested policy of the defendant not to grant agreements for more than one year."

3. *Financial History of Anderson Buick Company*

The Anderson Buick Company was an extremely profitable undertaking. From his original investment of $7,500 Mr. Anderson individually realized by way of salary, bonus, withdrawals, dividends, capital gains on sale of property, rental income and increase in net worth, the sum of $2,642,131 (Tr. Vol. IV, pp. 1319-20).

On December 31, 1936, the corporate net worth

was $75,657.97, of which General Motors had contributed $67,500. On June 30, 1953, the corporate net worth was $1,248,037.97. (Pl. Ex. 104, Tr. Vol. IV, pp. 1541-42).

These large sums were realized largely from the retail operations of Anderson Buick Company. During the years 1950, 1951 and 1952, the only years in which appellant maintained sufficient records to permit a detailed analysis, the average gross profit per new car sold *at retail* was $575, and the average sold *at wholesale* was $47 (Def. Ex. 45, Tr. Vol. V, pp. 1763-64).

Net profits before bonuses and income taxes shown on the financial statements submitted to Buick Motor Division were derived as follows (Def. Ex. 49, Tr. Vol. V, pp. 1772-74):

Year	*Retail Operations*	*Wholesale Operations*
1950	$592,112	$ 21,643
1951	223,983	(17,826)*
1952	43,668	(9,439)*

*Loss

Thus for the three-year period 1950-52, according to the financial statements, *retail operations produced a net profit* of $859,763 *and wholesale operations a net loss of* $5,622.[2]

---

[2]An audit of appellant's books made, at the request of General Motors for the purpose of this trial, by Lybrand, Ross Bros. & Montgomery, independent certified public accountants, showed a small variation, arising from post closing adjustments, in the net profit figures as shown by the financial statements submitted to General Motors and the net profit figures in appellant's books.

The audited figures are as follows (Def. Ex. A-51, Tr. Vol. V, pp. 1839-40): net profit from retail operations $942,081; net profit from wholesale operations $6,743.

4. *Buick Studies and Decision re Northwest Distributors*

Buick Motor Division from time to time over the years made studies of the relative advantages of factory distribution over private distribution (Pl. Ex. 81, Tr. Vol. V, pp. 1877, 1929-31).

Mr. Wiles, General Manager of Buick from November 1, 1948 through March 1956 when he became Executive Vice President of General Motors (Tr. Vol. VI, p. 2169), testified that the manner of distribution was exclusively within his province to decide (Tr. Vol. VI, p. 2197). He made the decision to change the method of distribution in the spring of 1952 (Tr. Vol. VI, p. 2197).

He testified that the principal considerations were the prospective ending of the Korean War, the removal of production restrictions and the pent-up consumer demand which would result in a substantial increase of production. He took into account the fact that a distributor received a maximum gross profit of "some $35 to $50 a car which was the amount of our override to a distributor when he made sales to his dealers" (Tr. Vol. VI, p. 2199), compared with the "between five and six hundred dollar per car" on dealer sales to customers. Thus the growth in post-war production and sales would produce "greater sales and profit opportunity" in terms of a retail dealership "than they (the Northwest distributors) were currently experiencing" (Tr. Vol. VI, p. 2200). This, combined with the trend in the industry toward a more effective method of distribution from the customer, dealer, and manufacturer standpoints, resulted in his decision to effect the change in the Northwest (Tr. Vol. VI, p. 2200).

5 *Offer to Anderson Buick Company and Its Response*

On July 10, 1952 at a meeting held in Portland, Mr. A. H. Belfie, General Sales Manager of Buick, advised the five Northwest distributors that on the expiration of their then current distributor agreements on October 31, 1952, Buick would offer each of them a new distributorship agreement for a term expiring June 30, 1953, and that after that date relationships with all five would be on a direct dealer basis (Def. Ex. A-68, Tr. Vol. VI, p. 2105).

This advance notice of one year was given so that appellant might have adequate time to plan accordingly (Def. Ex. A-67, Tr. Vol. VI, pp. 2097-98). Thereafter, on November 1, 1952, distributor agreements were entered into with all of the distributors, including Anderson Buick Company, which agreements expired by their terms on June 30, 1953.

On May 22, 1953, Mr. Belfie wrote to appellant, among others, and advised it that Buick would offer it a direct dealer selling agreement, in the form then in effect with all Buick dealers, for a term beginning on July 1, 1953 and invited them to a meeting on June 9, 1953 at Seattle (Def. Ex. A-69, Tr. Vol. VI, p. 2108). Four of the distributors accepted direct dealer selling agreements (Def. Ex. A-78, Tr. Vol. VI, pp. 2189-96). Appellant alone rejected the offer (Def. Ex. A-70, Tr. Vol. VI, pp. 2113-14; Tr. Vol. IV, p. 1311), although it was offered an exclusive franchise for the City of Seattle (Tr. Vol. VI, p. 2155).

Although repeated efforts were made by Buick to persuade appellant to accept a dealership contract (Tr. Vol. VI, pp. 2144-49, 2110-12; Def. Ex.

4. *Buick Studies and Decision re Northwest Distributors*

Buick Motor Division from time to time over the years made studies of the relative advantages of factory distribution over private distribution (Pl. Ex. 81, Tr. Vol. V, pp. 1877, 1929-31).

Mr. Wiles, General Manager of Buick from November 1, 1948 through March 1956 when he became Executive Vice President of General Motors (Tr. Vol. VI, p. 2169), testified that the manner of distribution was exclusively within his province to decide (Tr. Vol. VI, p. 2197). He made the decision to change the method of distribution in the spring of 1952 (Tr. Vol. VI, p. 2197).

He testified that the principal considerations were the prospective ending of the Korean War, the removal of production restrictions and the pent-up consumer demand which would result in a substantial increase of production. He took into account the fact that a distributor received a maximum gross profit of "some $35 to $50 a car which was the amount of our override to a distributor when he made sales to his dealers" (Tr. Vol. VI, p. 2199), compared with the "between five and six hundred dollar per car" on dealer sales to customers. Thus the growth in post-war production and sales would produce "greater sales and profit opportunity" in terms of a retail dealership "than they (the Northwest distributors) were currently experiencing" (Tr. Vol. VI, p. 2200). This, combined with the trend in the industry toward a more effective method of distribution from the customer, dealer, and manufacturer standpoints, resulted in his decision to effect the change in the Northwest (Tr. Vol. VI, p. 2200).

5 *Offer to Anderson Buick Company and Its Response*

On July 10, 1952 at a meeting held in Portland, Mr. A. H. Belfie, General Sales Manager of Buick, advised the five Northwest distributors that on the expiration of their then current distributor agreements on October 31, 1952, Buick would offer each of them a new distributorship agreement for a term expiring June 30, 1953, and that after that date relationships with all five would be on a direct dealer basis (Def. Ex. A-68, Tr. Vol. VI, p. 2105).

This advance notice of one year was given so that appellant might have adequate time to plan accordingly (Def. Ex. A-67, Tr. Vol. VI, pp. 2097-98). Thereafter, on November 1, 1952, distributor agreements were entered into with all of the distributors, including Anderson Buick Company, which agreements expired by their terms on June 30, 1953.

On May 22, 1953, Mr. Belfie wrote to appellant, among others, and advised it that Buick would offer it a direct dealer selling agreement, in the form then in effect with all Buick dealers, for a term beginning on July 1, 1953 and invited them to a meeting on June 9, 1953 at Seattle (Def. Ex. A-69, Tr. Vol. VI, p. 2108). Four of the distributors accepted direct dealer selling agreements (Def. Ex. A-78, Tr. Vol. VI, pp. 2189-96). Appellant alone rejected the offer (Def. Ex. A-70, Tr. Vol. VI, pp. 2113-14; Tr. Vol. IV, p. 1311), although it was offered an exclusive franchise for the City of Seattle (Tr. Vol. VI, p. 2155).

Although repeated efforts were made by Buick to persuade appellant to accept a dealership contract (Tr. Vol. VI, pp. 2144-49, 2110-12; Def. Ex.

A-71, Tr. Vol. VI, pp. 1116-17). Mr. Anderson refused to consider the offer unless he was given special consideration of an undefined nature. Instead, he instituted negotiations with the Chrysler Corporation for a DeSoto-Plymouth distributorship for a geographical area larger than that embraced in the Buick agreement. These negotiations resulted in a DeSoto-Plymouth distributorship which began operations in mid-August, 1958 (Tr. Vol. IV, p. 1296).

In March of 1954, a Packard distributorship was also undertaken (Tr. Vol. IV, p. 1298).

After the expiration of the Buick distributorship agreement on June 30, 1958, General Motors, in discharging in full each and every obligation imposed on it by the terms of the expired agreement (Tr. Vol. IV, p. 1261) paid Anderson Buick Company the sum of $145,112.68 (Def. Ex. A-75, Tr. Vol. VI, p. 1153).

C. Omission and Distortion of Facts in Appellant's "Statement of the Case"

1. *Alleged Pre-contract Representations as to Tenure*

Appellant's brief asserts (p. 4) that Mr. Anderson received assurance before he commenced operations as a dealer-distributor that he "need not concern himself about tenure so long as he did a proper job" and cites in support of this contention Mr. Anderson's testimony (Tr. Vol. III, pp. 834-837) and that of appellee's witness W. F. Hufstader (Tr. Vol. V, pp. 1254-55).

Mr. Hufstader testified that he had no conversations regarding the tenure of the distributorship

with Mr. Anderson (Tr. Vol. V, p. 1857). See also Tr. Vol. V, pp. 1871, 1910.

2. *General Motors' Alleged Control of Anderson Policies*

Appellant's contention that General Motors controlled appellant's policies is advanced on three footings (Br. pp. 4-6): first, that before new facilities could be acquired or existing facilities disposed of, appellant was required to obtain the advice and approval of responsible General Motors' officials; second, that in 1950 appellant lost the opportunity to make a highly profitable sale of the main facilities for $850,000 because Mr. Nash, the Regional Manager for Buick, suggested there be no sale; and third, that in 1951 Mr. Belfie, the General Sales Manager, advised against a promotional program then under consideration.

The first two of these assertions are demonstrably untrue; the third is completely without probative value.

(a) *Facilities*

The contractual obligation of the appellant in respect of facilities was contained in each of the eighteen contracts executed by the parties. It was, in substance, that the distributor would maintain new and used car facilities satisfactory to Buick Motor Division. (See Article 12, Tr. Vol. I, p. 70).

Appellant asserts that, except for the West Seattle property, it obtained the advice and approval of General Motors officials before acquiring or disposing of any of its facilities.

There was a sharp and extensive conflict between

the testimony of appellee's witnesses and that of Mr. Anderson on the issue of facilities. Appellee's witnesses testified that they generally learned of appellant's various building programs after the property had been purchased or construction was under way and that neither Mr. Anderson nor anyone else connected with appellant sought or required the approval of Buick Motor Division (Pl. Ex. 40, Tr. Vol. III, p. 861; Nash. Tr. Vol. V, pp. 1987, 1993-95, 1997-98; Belfie, Tr. Vol. VI, p. 2094; Hufstader, Tr. Vol. V. pp. 1862-63; Kennard, Tr. Vol. VI. pp. 2167-68; Nash, Def. Ex. A-64, Tr. Vol. V. p. 1993; Ruhe Dep., pp. 34, 51-52, Tr. Vol. III, p. 812. See also colloquy between counsel for the plaintiff and the Trial Judge, Tr. Vol. III, p. 990; C. H. Anderson, Tr. Vol. IV, pp. 1423-24; M. O. Anderson, Tr. Vol. III, pp. 1102-04, 1133-35, Vol. IV, pp. 1221-22, Def. Ex. A-24, pp. 1223-24).

There were diametrically opposed versions, which the jury had before it, between Mr. Anderson's account of his property acquisitions which he gave on the trial and the account he gave in his deposition before trial. On the trial he testified that he was required to and that it was his policy and practice to discuss any expansion program with Buick Division (Tr. Vol. III, pp. 1134-35). In his pre-trial deposition he testified exactly to the contrary. (Dep. p. 111, Line 16, Tr. Vol. III, pp. 1138-40):

Mr. Anderson:

> "Of course, Mr. Counsel, you want to remember that all these facilities that you talk of were facilities for the Anderson Buick Company operating as a dealership under the Anderson Buick Company operating as a distributor, and we as a distributor were not required to report

to the central office on any of these changes because the contracts were in our own files and they were held by us as a distributor."

In respect of the West Seattle property, appellant asserts (Br. p. 5) that it "was severely censured and was not permitted to use such facilities until the approval of Albert H. Belfie, Buick General Sales Manager, was obtained." In support of this assertion, appellant cites the testimony of Mr. Nash (Tr. Vol. V, p. 2022; Tr. Vol. VI, p. 2052), Regional Manager of the Buick Motor Division of appellee. The testimony referred to contains not one word of criticism, much less "severe censure," and shows that the West Seattle property was already in use and operation, and that Mr. Nash complimented Anderson as to its appearance.

Mr. Anderson's version of the establishment of the West Seattle branch (Tr. Vol. III, pp. 954-56) agrees generally with that of Mr. Nash and flatly contradicts the assertions on pages 5 and 6 of appellant's brief.

(b) *The Alleged Lost Opportunity to Sell the Main Facilities.*

The second argument advanced in support of appellant's contention that General Motors controlled appellant's policies is that appellant lost the opportunity to make a highly profitable sale of the main facilities for $850,000 because Mr. Nash suggested there be no sale. (Br. p. 6). *This assertion is categorically contradicted by every witness who testified, including Mr. Anderson, and by the contemporaneous documents.*

Mr. Nash testified (Tr. Vol. V. p. 2003):

A. Mr. Anderson never discussed with me

the sale or the prospective sale of his property in Seattle.

The Court: Did anybody else connected with Anderson Buick discuss that matter with you?

The witness: No, your Honor."

Mr. Anderson testified that he had asked McLaren, Goode, West and Company, appellant's independent certified public accountants, to explore the possibility of liquidating the corporations in order to get the cash proceeds into his possession (Tr. Vol. IV, p. 1244) and had particularly asked them to study the tax effect of the proposed sale. The accountants submitted a written letter opinion (Def. Ex. A-28, Tr. Vol. IV, pp. 1243-50) which strongly advised against the sale of the properties because of the $325,000 tax consequence and because of various other financial disadvantages to the corporation.

Mr. Anderson further testified that after receiving the letter opinion of his accountants he communicated with his real estate broker (Tr. Vol. IV, p. 1250):

"Q. Didn't you tell him in view of the letter and the tax you were not interested in selling the property?

A. Yes, I did, yes."

The real estate broker handling the transaction testified (Tr. Vol. V, pp. 1720-26) that he agreed with Mr. Anderson's decision not to sell the property. He stated (p. 1722):

"Q. No; you don't recall what Mr. Anderson said?

A. That he couldn't make the deal and lose

that much money out of the purchase price of $850,000.

Q. What did you say?

A. 'I don't blame you at all. I wouldn't either.'"

(c) *Alleged Advice in 1951 Against a Promotional Program.*

The third basis for appellant's contention that General Motors controlled appellant's policies is that in 1951 Mr. Belfie, General Sales Manager of the Buick Division, advised Howard Anderson against a promotional program then under consideration by appellant (Br. p. 6). Mr. Belfie testified that he advised (Tr. Vol. VI, p. 2093) against spending $20,000 on a raffle at a time that the appellant was seeking to reduce expenses.

The record is silent as to whether appellant actually desisted from the raffle because of Mr. Belfie's advice, although Mr. Howard Anderson testified at length (Tr. Vol. IV, pp. 1357-1440).

3. *The Alleged Buick "Chain of Command"*

This epithetical expression came into the case during the pre-trial examination of the witness Belfie. At the trial, on cross-examination, the witness was asked (Tr. Vol. VI, pp. 2130-31):

"Q. Now, there is an organizational chain of command in the Sales Department of Buick Motor Division, is there not?

A. Well, we don't call it a chain of command. We call it an organization chart.

Q. Well, have you ever called it a chain of command?

A. Once.

Q. When was that?

A. In my deposition in Detroit, when you took it from me. You started by telling me about a chain of command, and the next thing I knew you had me saying 'chain of command.'

The Court: It's the power of suggestion."

4. *General Motors' Alleged Control of Anderson Buick Company*

Appellant argues, with liberal use of colorful phraseology and without record references, that Buick Division achieved complete domination of the activities of appellant by use of what appellant calls "control devices." These alleged devices are said to be: inspection of facilities, meetings, reports and the use of a Zone Manual (Br. pp. 4-14).

The jury had before it appellee's explanation of all of these matters and also other evidence as to the manner in which appellant and appellee operated in their dealings. This evidence completely negates the inferences which appellant seeks to draw and shows that these so-called "devices" were nothing more than routine efforts to render assistance to appellant in the conduct of its business.

In respect to these matters, the Trial Court observed (Tr. Vol. II, p. 518, 161 F. Supp. 668, 674):

> "The evidence presented a sharp conflict as to the manner in which plaintiff corporation and defendant operated in their dealings. This conflict also extended to the matters on which plaintiff claimed it sought or received help, assistance, advice or guidance from the defendant."

A single reference will suffice to show the extent

to which appellant distorts the record in an effort to sustain its groundless inferences.

Appellant characterizes (Br. p. 14) the General Motors Zone Manual as still another "control device," containing various "unilaterally devised" requirements with which "Anderson and other distributors were required to comply." Failure to so comply, asserts appellant, resulted in censure, the "degree of censure depending on the area of nonconformity." One record reference is cited as support of this statement (Hufstader Dep. p. 387). This reference shows that the witness stated the distributor "wasn't required to conform; it (the Zone Manual) was sent to him as a matter of information." At no place in this testimony is there any reference to "censure" or required compliance with the Zone Manual.

Appellant advances three "illustrations" of the alleged use of the so-called "control devices":

(a) *Alleged Pressure to Increase Working Capital*

Appellant asserts that General Motors exerted constant pressure on appellant to increase its working capital even though appellant considered its working capital sufficient for its own needs, and that this pressure finally forced appellant to borrow $500,000 "in order to obtain the cash position which General Motors had ordained." (Br. pp. 14-15).

The answer to this first "illustration" of "domination and control" is five-fold: (a) Appellant by contract agreed with appellee that it would provide working capital in a stated amount (Sec. 14 of Dis-

tributor Selling Agreement. Tr. Vol. I, p. 71; also see Agreed Capital Standards Agreement, Pl. Ex. 70, Tr. Vol. III, p. 1004); (b) at all times postwar, appellant's capital was completely inadequate and for a period was actually in the red because of heavy withdrawals and speculations in California and Washington real estate and other ventures unconnected with the automobile business (the Palm Springs speculations alone in the year ending April, 1952, involved $314,282) (Pl. Ex. 21; Def. A-23; Tr. Vol. IV, pp. 1206-16); (c) Anderson acknowledged under oath that the working capital of the appellant was inadequate (Tr. Vol. III, p. 908) and that the amount established by appellant was entirely reasonable. (Tr. Vol. III, pp. 908, 993); (d) the $500,000 loan was used to pay obligations to banks and others (Tr. Vol. III, p. 1148; Def. Ex. A-5, Tr. Vol. III, p. 1160; Def. Ex. A-27, Tr. Vol. IV, pp. 1232-33; 1208-10); and (e) appellant's own exhibit shows that the necessity for the loan did not arise from anything said or done by General Motors but arose because of appellant's activities in the retail finance business (Pl. Ex. 28, Tr. Vol. III, pp. 806-808; Def. Ex. A-25, Tr. Vol. IV, pp. 1217-18).

The jury had before it varying versions as to why the $500,000 was borrowed and none of them had anything to do with appellant's cash position.

Mr. Anderson testified in response to questions by the court (Tr. Vol. III, p. 1148):

> "The Court: July 11, 1952. Did I understand you to say that when you secured the mortgage of one half million dollars on January 5, 1952, that with that money you liquidated the loans, two loans, to the banks?

"The Witness: That is correct, your Honor.

"The Court: So that it is fair to say then that in the latter part of January, 1952, your indebtedness to the bank had been fully paid?

"The Witness: That is correct, your Honor.

"The Court: And in the next six months did your indebtedness to the banks arise to $400,000?

"The Witness: We had some additional in- investments, real estate, and we—

"The Court: No, I simply ask you.

"The Witness: Yes, it did; it did, yes."

Appellant's application to the Massachusetts Mutual Life Insurance Company for the loan dated October, 1951 (Def. Ex. A-5, Tr. Vol. III, p. 1160) stated that the purpose of the loan was:

"To retire short term indebtedness."

Mr. Anderson advised his certified public accountants, Haskins & Sells, in a letter dated August 12, 1952 (Def. Ex. A-25, Tr. Vol. IV, pp. 1217-18):

> "After all the purpose of the loan was for financing paper, and as A.B.C. is handling the paper, it would only seem logical that they should carry the liability."

The use to which the $500,000 was put was described by Mr. Anderson (Tr. Vol. III, pp. 1162-63, 1208-10, Def. Ex. A-27, 1232).

It will be seen that the money was not, as alleged in appellant's brief (pp. 15-16), borrowed "to obtain the cash position which General Motors had ordained" for appellant nor was any part of it used for that purpose.

Finally, the desire for the $500,000 loan arose as a result of appellant's own conduct, the loan was obtained in the exercise of its independent business judgment, and the receipt of the money did not affect appellant's operating cash position in any way. This is made crystal clear by the following language in Plaintiff's Exhibit 28 (Tr. Vol. III, pp. 806-808) which was read to the jury *by appellant's counsel*:

> *"It does not work to increase their operating cash, and there is always the danger that if they continue to finance their paper themselves they again may find themselves owing a sizeable amount of short term paper which, as we analyze their present balance sheet, is the difficulty today."* (Emphasis supplied).

(b) *Alleged Pressure to Expand Facilities*

The second "illustration" of the alleged use of "control devices" by General Motors to achieve "domination and control" of appellant is the allegation that (Br. p. 16):

> "In line with this policy Anderson, along with other dealers and distributors, was constantly urged to expand his sales and service facilities."

The complete answer to this contention is contained in Defendant's Exhibit A-64 (Tr. Vol. V, p. 1993) which is a letter addressed by Buick Motor Division to appellant under date of July 9, 1947, long before there was any intimation of the present lawsuit. Exhibit A-64 states:

> "The Buick Motor Division has been very careful not to require or even suggest to dealers that they spend too much of their money on new buildings***."

The reasons advanced by Mr. Anderson at the

trial for the expansion of appellant's facilities was (Tr. Vol. III, p. 1114) "we were ambitious and needed more space *** for the expanding market" and that the City required a fireproof paint shop.

See also Def. Ex. A-24, Vol. IV, p. 1221.

(c) *Alleged "Blunt Order" to Mr. Anderson Not to Run for a Second Term as President of N. A. D. A.*

Appellant's third "illustration" of "domination and control," cited as "the most dramatic illustration" of the threat of force by appellee in its efforts to dominate appellant's business, is Mr. Hufstader's alleged "blunt order" to Mr. Anderson in early 1948 (Br. p. 17) that he not run for a second term as president of the National Automobile Dealers Association in 1948 in spite of Mr. Anderson's "great desire to do so."

This is a complete distortion of the record. Mr. Anderson testified (Tr. Vol. III, p. 894):

"Q. Do you recall having a conversation with Mr. Hufstader, whether you should run again for the national presidency of the N.A.D.A.?

A. Mr. Hufstader told me *he thought maybe I was neglecting business and I should stay home and tend to business,* rather than being president of N.A.D.A.

Mr. Hufstader testified (Tr. Vol. V, p 1864):

"*** the second item that I wanted to discuss with him was *to ask him* very definitely not to stand for re-election as President of the National Automobile Dealers Association; not that we had any particular fuss with them, but because I felt very definitely that his business here in Seattle needed his undivided time and

attention, and particularly in light of the fact that that was one of the stipulations of the selling agreement."

The contract between the parties provided (Tr. Vol. I, p. 70):

"11. Each person named in Paragraph Third of this Agreement shall devote his full time, attention and energy to the conduct of the distributorship business."

At the time Mr. Hufstader gave this advice in January, 1948, Mr. Anderson had completed a term as Vice President of the Dealers Association which had necessitated his absence from Seattle for extended periods. During 1947, he served as President of the Association which necessitated his absence from Seattle for even more extended periods. (Tr. Vol. IV, pp. 1224-25).[3]

As to whether Mr. Anderson had any desire "great" or otherwise to run for re-election, the record is silent.

The implication (Br. p. 18) that the activities of the Motor Holding Division during the period that it owned stock in appellant were improper in some undefined manner is inconsistent with the position taken on the trial, as demonstrated by the vary record references cited (Tr. Vol. III, pp. 870-72).

The Trial Court observed that "supervision exercised either directly or indirectly" during the time when General Motors had contributed to the capital

---

[3]See also Defendant's Exhibit A-27, admitted at Tr. Vol. IV, p. 1232, in which Mr. Anderson's son suggests on January 25, 1952, that in view of the possible interest of the Internal Revenue Agent in Mr. Anderson's absences from Seattle, that it would be a good idea to at least *come through* Seattle on his return from New York to Palm Springs.

was in "no measure the same relationship" that later existed after the contribution had been paid (Tr. Vol. III, p. 979).

Mr. Anderson testified that after Motor Holding was paid off they stepped out and he ran the business independent of General Motors.

"The Court: And thereafter you directed the affairs of Anderson Buick?

A. That is correct, yes, sir.

Q. *And you were the officer or you were the boss?*

A. *The boss, yes.*

The Court: *It was your venture?*

A. *Yes, sir.*" (Emphasis supplied)
(Tr. Vol. III, p 874)

Mr. Anderson further testified (Tr. Vol. III, p. 848):

"The Court: Did you dissolve this corporation as soon as you paid off—

A. As soon as we paid off Motors Holding, yes.

The Court: *And you ran it as a private business then?*

A. *Yes, your Honor.*"

5. *Partners in Progress*

Appellant's argument that the relationship between General Motors and its 18,000 dealers is one of partnership, as that term is used in the law, seems largely an exercise in semantics. The agreements each provided (Tr. Vol. I, p. 95):

"This Agreement of which these Terms and Conditions are a part does not constitute Dis-

tributor the agent or legal representative of Seller for any purpose whatsoever." (Art. 30).

The testimony of Mr. Anderson makes it very clear that, except for the periods 1936-1940 and 1942-1945 when the appellant operated with General Motors capital as a Motor Holding dealership, General Motors has never participated in appellant's profits, or its losses, owned any of its stock, or had representation on its Board of Directors or in its management. Appellant borrowed in excess of a million dollars in the conduct of its business affairs without notice or advice to General Motors.[4] Appellant hired and fired its own employees, speculated in Washington and California real estate, engaged in the manufacture of kitchen appliances, highway flasher signals, toys, etc., utilizing the capital of Anderson Buick Company, without notice to or knowledge of General Motors. In a word, to quote Mr. Anderson (Tr. Vol. III, p. 874) he "was the boss"; the company was "his venture"; and he acted on his own independent judgment in conducting its affairs (Tr. Vol. III, p. 1154).

The evidence shows that the relationship created by the contracts between appellant and General Motors is completely inconsistent with any concept

---

[4]After Mr. Anderson had testified that he had borrowed large sums of money from a number of banks without notice to or review by anyone connected with General Motors (Tr. Vol. III, pp. 1153-54) the following colloquy occurred (p. 1154):

"The Court: You worked—you acted on your own independent judgment in making these loans?

A.—Yes.

The Court: Did you act on your own independent judgment in making all other bank loans?

A.—Generally, yes, your Honor."

Mr. Howard Anderson testified the making of these large loans wasn't "any concern" of Buick. (Tr. Vol. IV, p. 1413.)

of partnership, agency, trust or anything else but a purely independent contractual undertaking.

The main base of appellant's argument that a partnership existed nonetheless, seems to be the rhetorical expression "Partners in Progress" coined by Mr. Curtice, President of General Motors, and used for the first time in a speech at a dinner, given in Mr. Curtice's honor, in Chicago in 1954. Appellant seizes on this expression, and argues that the parties owed one another the fiduciary obligations inherent in a partnership arrangement. Mr. Curtice, in his deposition, repeatedly made it clear that he was not using the word "partner" as a legal word of art and that he was speaking as a businessman. (Dep. p. 204).

6. *Alleged dominant position of General Motors*

Appellant's argument under this rubric (Br. pp. 21-22) seems to be that General Motors owed appellant some special duty above and beyond the mutual duties and obligations of the contracts because it occupied a "subservient" position.

(a) In support of the contention, appellant first asserts that periodically General Motors "would herd its distributors together" and pass out the printed forms of agreement. This assertion is not supported by the record references cited (Tr. Vol. III, pp. 1087-88; Tr. Vol. V, pp. 1954-55; Curtice Dep. pp 276-77), and is flatly contradicted by Mr. Anderson's testimony.

Mr. Anderson testified (Tr. Vol. IV, p. 1179), in response to questions as to the procedure followed in contracting:

> "Q. Do you recall how you received this contract for execution, Mr. Anderson?

A. My best recollection would be in the mail. Sometimes we have meetings as I testified and sometimes through the mail."

Any inference that appellant executed the eighteen contracts between the parties as a result of "business compulsion" or because of misrepresentation or because of appellee's failure to disclose information has, of course, been completely refuted by the jury's explicit finding to the contrary (Tr. Vol. II, pp. 500-503).

(b) Appellant next refers to the fact that General Motors was larger and had more money than Anderson Buick Company. The relevance or materiality of the comparative size and wealth of appellant and appellee is not shown. Such argument would be out of order in a jury argument; it surely has no place in a United States Circuit Court of Appeals. Appellant's claim that the ending of the distributorship resulted in its financial ruin is, of course, groundless.[5] (See *supra,* pp. 10-11).

(c) Appellant's final assertion that the fixed assets on Anderson Buick Company were one purpose buildings in which it would be impossible to operate any business except a Buick distributorship at a profit is specious. The facilities were not only usable for other lines of cars, as is witnessed by the fact that Mr. Anderson became the DeSoto-Plymouth distributor for Chrysler Corporation (Tr. Vol. III, p. 1075) and the Packard distributor for Packard Motor Car Co. (Tr. Vol. III, p. 1080), they were also

---

[5]The trial court noted: "That the plaintiff may have hoped for the continuance of renewals is immaterial; that his fondest hope was not fulfilled in the eighteen agreements which were made is questionable; * * * (Tr. Vol. VI, p. 2475.)

readily adaptable for other purposes (Bauer Dep. pp. 33-34; Tr. Vol. III, pp. 801-02).[6]

That the DeSoto-Plymouth operation was a suitable one for the buildings and promised substantial profits cannot be doubted but to quote Mr. Anderson "our timing was bad." (Tr. Vol. IV, p. 1319). According to Mr. Anderson, the DeSoto-Plymouth operation failed because of the shortcomings of the Chrysler Corporation, its products and its representatives. This is detailed in defendant's Exhibit A-40 (Tr. Vol. V, p. 1687) and there is not a single word that suggests that appellant felt that its inability to make profits was due to excessive fixed assets.[7]

As to the Packard franchise, Mr. Anderson testified that it was his opinion that the profit potential of the Packard distributorship, at the time he took it, was very good (Tr. Vol. III, p. 1081). The reason for his failure as a Packard distributor was not shown.

---

[6]Defendant's Exhibit A-50, which is based on the financial statements submitted to appellee, admitted without objection, (Tr. Vol. V., p. 1774) shows that appellant's *retail* operations for the three years 1950-52 produced a profit of $859,763. His *wholesale* operation for the same period resulted in a *net loss* of $5,622.

[7]Appellant's account of his experience as a Chrysler distributor, as related in Defendant's Exhibit A-40, presents an interesting parallel to his account in the present case of his experience as a Buick distributor. There, as here, Mr. Anderson attempted to create unilaterally a "partnership"; there, as here, he contended that he was the victim of fraudulent misrepresentations and non-disclosures; there, as here, he contended that the Chrysler Corporation failed to treat him fairly and failed to cooperate in respect of car distribution, personnel, inventories, etc.; and there, as here, Chrysler failed to understand and appreciate that its distribution system was, in Mr. Anderson's opinion, unsatisfactory.

7. *Buick's Alleged Policy and Anderson's Alleged Reliance on Long-Range Nature of Distributorship*

All of the assertions in appellant's brief (pp. 22-32), concerning action allegedly taken because of appellee's failure to notify it of a so-called policy, have been disposed of by the findings and verdict of the jury. The jury necessarily found, and on the evidence could not have found otherwise, that appellant took no action of *any* kind on *any* non-disclosure of the appellee in respect to *any* matter.

In support of its contention (Br. pp. 29-30) that Anderson relied on representations made by Nash at the November 9, 1951, meeting appellant cites *Anderson's own version of the meeting as a categorical fact.* Nash's version which conflicts in every material particular is skipped over lightly with the comment that "Nash's testimony of the 1951 meeting differs in some respects from that of Anderson." Thus appellant claims reliance upon representations that *the jury found were never made.*

In the trial court, appellant's counsel took a different position. After posing the two irreconcilable versions of the meeting, counsel for appellant told the jury it was for them "to resolve the conflict". (Tr. Vol. II, p. 511).

The jury ,as noted by the trial court (Tr. Vol. II, p. 511),"answered these rhetorical questions of counsel by their verdict; they rejected the testimony of Anderson and accepted the testimony of Nash," and found as an independent fact (Ans. to Spec. Interrog. No. 1, Tr. Vol. II, p. 500) that Mr. Anderson's version of the meeting of November 9,

1951, which is set forth in appellant's brief (pp. 29-30) is untrue.

The contention in the brief (p. 31) that appellant acted in reliance on its belief that its distributorship contract would run indefinitely is contradicted by Anderson himself.

It is perfectly plain that appellant recognized that its relationship with Buick Division was a simple contractual one and that its rights and duties and appellee's rights and duties were those set forth in the contract. In a memorandum to Weston, the General Manager of appellant (Tr. Vol. IV, p. 1303; Def. Ex. A-33), Anderson stated:

> "It should be made very clear that Anderson Buick Company has a contract that runs for only two years beginning October 15, 1945. This contract definitely terminates October 15, 1947, with no recourse for Anderson Buick Company other than such consideration as covered in the GM contract covering unexpired leases and leasehold improvements."

Mr. Anderson further testified (Tr. Vol. IV, p. 1305) with reference to the quoted statement: "there is nothing inaccurate about that statement."

In spite of this solemn judicial admission by the president of the appellant corporation, appellant's Brief asserts (p. 31)that Anderson invested substantial sums of money in reliance on his belief that notwithstanding the term of his contract he would be recontracted as a distributor indefinitely. The expenditures alleged to have been made in reliance on this belief were as follows:

(a) The purchase of the Westlake Corporation stock by M. O. Anderson.

(b) The acquisition of the Westlake stock by Anderson Buick Company.
(c) Construction of Unit 3.
(d) The $500,000 mortgage loan.
(e) Extensive advertising.

The evidence conclusively demonstrated that *none* of these expenditures was made as a result of any reliance on any non-disclosure and the jury so found.

(a) *The purchase of the Westlake Corporation stock and its resale to Anderson Buick Company.*

M. O. Anderson purchased the stock of Westlake Corporation, owner of the premises leased by Anderson Buick Company, not because of any reliance as to tenure, but because it was a good investment. Mr. Anderson agreed to pay $226,000 (Tr. Vol. III, p. 1109) for the outstanding stock; he made a down payment of $35,000 of which $18,000 was an advance from Anderson Buick Company (Tr. Vol. III, p. 1105). Rental payments by Anderson Buick Company were applied upon the purchase price (Pl. Ex. 63, (Tr. Vol. III, p. 986). After $75,000 to $85,000 of installment payments had thus been made for his personal account (Tr. Vol. III, p. 1110), Anderson Buick Company agreed to buy the stock from Mr. Anderson for $350,000. It elected to pay the balance due for Westlake Building Company stock and made final payment to Mr. Anderson in 1950. Thus Mr. Anderson enjoyed a capital gain of $125,000 on an investment of $17,000.

(b) *Construction of Unit* 3

The reason stated by Mr. Anderson for the con-

struction of Unit 3 was that "we were ambitious and needed more space and had to have more room for cars and parts and the market was expanding" (Tr. Vol. III, p. 1114).

That these were retail facilities there can be no doubt (Def. Ex. A-24, Tr. Vol. IV, pp. 1221-24, Tr. Vol. V, pp. 1733-40, Tr. Vol. III, pp. 1114-21).

(c) *The* $500,000 *mortgage loan*

Whichever of Mr. Anderson's several accounts as to the reason for the $500,000 loan is accepted, it is clear beyond the possibility of argument that the money was utilized in the retail rather than the distributor aspect of its business (see *supra,* pp. 22-24).

(d) *Expenditures for advertising*

Mr. Anderson's testimony on the trial that he would not have spent money advertising if he had known that his distributorship would not be renewed indefinitely and that his advertising related to his wholesale operation rather than his retail operation was so inherently incredible that it moved the Court to examine Mr. Anderson at length (Tr. Vol. V, pp. 1632-37). One example will suffice to show that the witness's testimony bordered on the ludicrous:

> "The Court: You said that had you known Buick Division's policy as you allege with reference to the distributorship, that you would not have employed this man or these people in this advertising department in the year 1947?
>
> A: No.
>
> The Court: My question is: Is your answer the same if you consider the fact that

during that year you had a gross sale of $4,450,000 in cars and parts and service?

A: Yes, it's the same, your Honor."

No comment seems necessary.

8. *Anderson Alleged Discovery That He Had Been Defrauded*

Appellant asserts (Br. p. 32) that appellant did not discover that it had been defrauded until October of 1953.

In two verified complaints, it was alleged that the fraud was first discovered on July 10, 1952, the date of the Portland meeting advising of the ending of the distributorship on June 30, 1953.

On June 19, 1957, over the objection of the defendant, Judge Bowen permitted plaintiff to amend the amended complaint in an attempt to meet defendant's affirmative defense of waiver. This third verified pleading alleged that the fraud was first discovered on October 21, 1953, a date considered safely past November 1, 1952, when plaintiff executed the last distributorship contract. (Tr. Vol. I, p. 365).

The intelligence which appellant contends gave it first knowledge that it had been defrauded is Plaintiff's Exhibit 81 which is a letter dated October 21, 1953, and sent to one Friedlander, a customer of Anderson Buick Company. Mr. Anderson testified that *"it was in October,* 1953, *when Mr. Paul Friedlander, a customer of ours, brought this letter to my office."* (Tr. Vol. III, p. 1070).

Thus when Mr. Anderson verified the first two complaints which alleged that he *knew* that appel-

lant had been defrauded on July 10, 1952, he had before him the Friedlander letter of October 21, 1953 (Pl. Ex. 81, Tr. Vol. III, pp. 1070-73). How Mr. Anderson could *know* a fact occurred on July 10, 1952, with sufficient certainty to solemnly swear to it on July 5, 1955, and again on May 17, 1957, and then swear on June 19, 1957, that he did not know the same fact until October 21, 1953, was never explained to the jury. The Friedlander letter was admitted into evidence as testing Mr. Anderson's credibility (Tr. Vol. III, p. 1070), as indeed it did.

SUMMARY OF ARGUMENT

By its general verdict and answers to the interrogatories, the jury found that appellee had not been guilty of any fraud; that appellant was not justified in acting on the assumption that its distributorship would be continued indefinitely; that appellant did not, in fact, take any action in reliance upon, or suffer any damage as a result of, the alleged misrepresentations or non-disclosure; and that appellant did not enter into any of its highly profitable agreements with appellee because of any business compulsion or fraud. There was abundant evidence to support the findings.

The Trial Court could not have charged that the existence of a relationship of trust and confidence had been established as a matter of law. The evidence with respect to the nature of the relationship between the parties, like the evidence with respect to each of the other basic issues in the case, was in direct and irreconcilable conflict. Accordingly, the Court properly left it to the jury to determine, as a question of fact, "upon all the evidence exactly what that relationship was" and "if you are satisfied

that a relationship of trust and confidence did exist * * * whether in fact the overall policy of General Motors with reference to continuance of the existing distributorship was of such a nature as fell within the orbit of the relationship of trust and confidence and should have been disclosed to Anderson Buick Company" (Tr. Vol. VI, p. 2400). There was abundant evidence to support the findings of the jury that the relationship between the parties was not, in fact, one of trust and confidence or such as to require disclosure of the alleged policy.

ARGUMENT

I.

BY ITS GENERAL VERDICT, AS WELL AS BY ITS ANSWERS TO THE INTERROGATORIES, THE JURY FOUND THAT APPELLANT HAD FAILED TO ESTABLISH THE ESSENTIAL ELEMENTS OF A CAUSE OF ACTION FOR FRAUD.

APPELLANT'S CONTENTION THAT THE JURY FOUND ALL ESSENTIAL ELEMENTS, EXCEPT A DUTY TO DISCLOSE, IS WITHOUT MERIT.

Appellant prefaces its argument concerning the alleged error in the Court's charge with a preliminary contention that is wholly unfounded. The preliminary contention (Br. pp. 45-51) is that the alleged error in the charge requires reversal of the judgment because, if there was a duty to disclose, the jury's answers to the interrogatories established each of the other elements necessary to establish appellant's claim of fraud. Accordingly, appellant contends, if there was a duty to disclose, "the jury's general verdict necessarily would have been in favor of Anderson rather than of General Motors" (Br. p. 51). The contention is baseless.

A. The law of Washington as to fraud.

The nine essential elements of a cause of action for fraud have been reiterated in case after case by the Supreme Court of Washington. *Webster v. Romano Engineering Corp.,* 178 Wash. 118, 120-1, 34 P.2d 428, 430 (1934); *Peoples National Bank of Washington v. Brown,* 37 Wn. 2d 49, 60, 221 P.2d 530, 536 (1950); *Graff v. Geisel,* 39 Wn. 2d 131, 141, 234 P.2d 884, 889-90 (1951); *Puget Sound National Bank v. McMahon,* 153 Wash. Dec. 40, 42, 330 P.2d 559, 560 (1958):

> "These are: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage." *Webster v. Romano Engineering Corp., supra.*

Failure of proof of a single one of the nine essential elements wholly bars recovery in a fraud action. *Loehr v. Manning,* 44 Wn. 2d 908, 272 P.2d 133 (1954). In *Puget Sound National Bank v. A. J. McMahon, supra,* the Court again reiterated the settled rule:

> "In an action for fraud, the burden is upon plaintiff to prove the existence of *all* the essential and necessary elements 'that enter into its composition' * * *. All of the ingredients must be found to exist. The absence of any one of them is fatal to a recovery." (330 P.2d at p. 560-1).

The burden of proof upon the plaintiff is partic-

ularly heavy because, in Washington as in many jurisdictions, the presumption of innocence of fraud is as strong as "the presumption of innocence of crime." See *Dobbin v. Pacific Coast Coal Company,* 25 Wn. 2d 190, 202, 170 P.2d 642, 648 (1946):

> " 'It follows from the rule that fraud will not be presumed that the burden of proving fraud rests on the party who relies on it either for the purpose of attack or defense.
>
> " 'The rules which impose the burden of proof on one alleging fraud and which deny a presumption of fraud rest on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, *the presumption against fraud approximating in strength the presumption of innocence of crime.*' (Italics ours.)"

Whether the claim for fraud is based upon a statement of fact, shown to be untrue, or a failure to speak where there is a duty to speak, proof of an actual intent to deceive and defraud is of the very essence of the cause of action. As stated by the Court in *Brown v. Underwriters at Lloyds,* 153 Wash. Dec. 126, 130, 332 P.2d 228, 231 (1958):

> "Over a hundred years ago, the supreme court of North Carolina in Tilghman v. West, 43 N. C. 183, 184, declared:
>
> '* * * Fraud cannot exist, as a matter of fact, where the intent to deceive does not exist; for it is emphatically the action of the mind which gives it existence. * * * ' "

In *Lincoln v. Keene,* 51 Wn. 2d 171, 173-4, 316 P. 2d 899, 901 (1957), the Court said:

> "The applicable general rules with reference to fraud by concealment are: * * *
>
> "(3) If the circumstances surrounding the contract impose a duty upon one of the parties to disclose all material facts known to him and not known to the other, want of disclosure *with intent to deceive* will amount to fraud." (Emphasis supplied).

B. The Jury's Verdict

Appellant's contention that, if there was a duty to disclose, the jury's answers to the interrogatories established an intent to deceive and each of the other elements necessary to establish its claim of fraud is so demonstrably without basis that it is difficult to believe it is seriously advanced.

The two answers upon which appellant relies are each to be read in the light of the jury's general verdict, which resolved all issues of fact in favor of appellee, and in the light of the jury's further specific findings. The further specific findings were that appellee *did not* "during the period 1937-1941 formulate and adopt a policy which in substance provided for the termination of the distributorship of Anderson Buick Company" and that appellee *did not* "continuously have such a policy for the period from 1941 to July 10, 1952" (Tr. Vol. II, p. 501). These basic findings were not only supported but were compelled by the evidence.

The two findings invoked by appellant are (1) the finding that, on November 9, 1951, appellee had a policy which, in substance, provided for the termination of appellant's distributorship and (2) the

finding that appellant did not know and was not chargeable with knowledge thereof. The jury made no other findings on which appellant could or does attempt to rely. Even assuming, contrary to the fact, that the jury had found the relationship between the parties to have been "a confidential relationship" and that such a policy "fell within the orbit of the relationship of trust and confidence" (Tr. Vol. VI, p. 2400) so as to require appellee to notify appellant thereof, these findings would still be wholly insufficient to establish a cause of action for fraud.

The jury would still have to find (1) that appellee's failure to notify appellant of its alleged policy was due to an intention to deceive and defraud appellant, (2) that, despite the express provisions of the written agreements between the parties, appellant had the right to rely upon the assumption that its distributorship would be indefinitely continued and (3) that appellant had in fact acted in reliance upon such assumption and suffered damages as a result of any action so taken.

Far from so finding, the jury found exactly the opposite by its general verdict in favor of appellee, as well as by its answers to the interrogatories. There was substantial evidence to support a finding by the jury in favor of appellee on each of the issues which the Court submitted to the jury in its charge. In *Traders & General Ins. Co. v. Powell,* 177 F. 2d 660, 663 (8 Cir. 1949), the Court said:

> "The sole question for our determination on this issue is, therefore, whether there is any substantial evidence to support the verdict of the jury for the appellee. In considering this question we assume as established all the facts

that appellee's evidence reasonably tends to prove, and there must be drawn in her favor all the inferences fairly deductible from such facts. *Lumbra v. United States,* 290 U.S. 551, 552, 54 S.Ct. 272, 78 L.Ed. 492; *Sears, Roebuck & Co. v. Scroggins,* 8 Cir., 140 F.2d 718, 723; *F. H. Peavey & Co. v. First National Bank of Dickinson,* 8 Cir., 140 F.2d 815. Problems presented by conflicting evidence or depending upon credibility of witnesses and weight of the evidence are to be decided by the jury and not by this or the trial court. *Walkup v. Bardsley,* 8 Cir., 111 F.2d 789; *Lynch v. United States,* 2 Cir., 162 F.2d 987."

1. In its charge, the Court expressly left it to the jury to determine whether there was any intention on the part of appellee to deceive and defraud appellant, either by the statements attributed to Mr. Nash or by appellee's failure to notify appellant of its alleged policy (Tr. Vol. VI, pp. 2408, 2425). By its general verdict for appellee, the jury found that there was no such intention.

2. In its charge, after summarizing the provisions of the written agreements between the parties (Tr. Vol. VI, pp. 2413-16), the Court expressly left it to the jury to determine,

"whether the Anderson Buick Company received such notice from their contents as to make it unreasonable for that company, exercising ordinary business prudence, to rely upon any statement (2667) which might have been made to plaintiff concerning the policy of General Motors, particularly with reference to a continuance of the distributorship beyond the one-year term for which they provided; and also whether Anderson Buick Company by these annual agreements was put on notice that the term of its distributorship was limited to a

> period of one year and that further renewal might thereafter be denied plaintiff by General Motors and that there was then no present policy of General Motors which operated to grant to Anderson Buick Company a distributorship for any period beyond the one year provided."

By its general verdict for appellee, the jury found that appellant did receive such notice from the written agreements.

3. In its charge, the Court expressly left it to the jury to determine whether appellant had acted in reliance upon, and suffered any damages as a result of, the alleged misrepresentations or non-disclosure (Tr. VI, pp. 2409-10, 2418-19, 2422, 2425-26). By its general verdict for appellee, which was supplemented by its specific finding in answer to Interrogatory No. 9(a) (Tr. Vol. II, p. 502), the jury found that appellant had not acted in reliance upon, or suffered damages as a result of, the alleged misrepresentations or non-disclosure.

4. Finally, the Court, without objection or exception by appellant, charged that (Tr. Vol. VI, p. 2417)

> "these agreements constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements or that plaintiff sustained any injury as a result of the alleged non-disclosure,"

unless the jury found that appellant, as it claimed, had been caused to enter into the agreements by "business compulsion" or fraud on the part of appellee. Both by its general verdict and by its answers to Interrogatory No. 10 (Tr. Vol. II, pp. 502-03) the jury found that appellant had not been caused to

enter into the written agreements either by "business compulsion" or by fraud.

Appellant's contention (a) that appellee had fraudulently sought to induce appellant to believe that its distributorship would be continued indefinitely, (b) that appellant was justified in relying upon such belief, and (c) that appellant had, in fact, acted in reliance on such a belief was in complete and irreconcilable conflict with the express provisions of the written agreements between the parties. Each of the earlier annual agreements contained ninety-day cancellation clauses and each of the agreements entered into after 1947 limited the term of the distributorship to one year (Tr. Vol. VI, p. 2389) and expressly provided (Tr. Vol. I, p. 54):

> "At the end of the stipulated term, this Agreement shall automatically terminate without notice or action on the part of either party unless sooner terminated as hereinafter provided in Section 26."

The final article of the agreements, entitled *"Sole Agreement of the Parties"*, specifically stated (Tr. Vol I, pp. 97-98):

> "No change in, addition to, or erasure of any printed portion of this Agreement (except the filling in of blank lines) shall be valid or binding upon Seller unless the same is approved in writing by the General Manager or General Sales Manager of Seller.
>
> * * *
>
> "There are no other agreements or understandings, either oral or in writing, between the parties affecting this Agreement or relating to the sale or servicing of Buick motor vehicles, chassis, parts or accessories.
>
> "This Agreement cancels and supersedes all previous agreements between the parties."

Appellant's contention that it suffered substantial losses as a result of appellee's failure to notify it that its distributorship would not be continued indefinitely was in complete and irreconcilable conflict with (a) the fact that Mr. Anderson personally realized the sum of $2,642,131 during the sixteen-year period on the basis of an original investment of $7,500; (b) the fact that the corporate net worth increased from $75,657 on December 31, 1936 (of which amount appellee had contributed all but $7,500) to a corporate net worth of $1,248,037 on June 30, 1953 when appellant elected not to continue its relationship with appellee on a dealership basis, and (c) the fact that, regardless of which of appellant's varying versions of the purpose of its $500,000 loan in November, 1951 be accepted, not a single penny of the amount was used for the acquisition of wholesale facilities (see pp. 22-24, *supra*).

There is, in short, no possible basis for appellant's bald assertion (Br. p. 51) that "if there was a duty to disclose as a matter of law, the jury's general verdict necessarily would have been in favor of Anderson rather than of General Motors."

II.

THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT APPELLEE WAS LEGALLY OBLIGATED TO NOTIFY APPELLANT OF ITS ALLEGED POLICY.

APPELLANT'S SPECIFICATION OF ERROR NO. I IS WITHOUT MERIT.

A. The Trial Court's Answer to Specification of Error No. I

The Trial Court, when denying appellant's motion

for a new trial, discussed at length the lack of basis for Specification of Error No. I (161 F. Supp. 668, 672, 674, Tr. Vol. II, pp. 511-12, 516-18). The Court's conclusion that Specification of Error No. I is groundless is amply supported by the record.

B. The Court's Charge

The Court's charge clearly presented to the jury the basic factual issue raised by the conflicting claims and evidence of the parties. The Court first described the nature of appellant's claim of fraud by non-disclosure and then summarized briefly the basic uncontroverted facts with respect to the overall relationship between the parties (Tr. Vo. VI, pp. 2397-98):

> "There was a commercial and business relationship between the plaintiffs and General Motors. Plaintiff was in this locality as the marketing outlet of the Buick; each party had a real business interest in each other's operations.
>
> "The Anderson Corporation functioned as a business enterprise controlled by its own stockholders and officers, and General Motors did not share in its profits, save during the early years when Motors Holding was a stockholder."

The Court then stated appellee's contention with respect to the nature of the relationship between the parties (Tr. Vol. VI, pp. 2398-99):

> "It is the contention of General Motors that its interest in the activities of the Anderson Corporation as one of its distributors and dealers was upon a strictly business basis as was outlined and provided for by the written agreements which were in the main annually made, that such supervision as it exercised was to see

that these agreements were observed and performed, that the actual operation of the distributorship and dealership was left to the judgment and ultimate decision not of General Motors but of Anderson Buick Company and that while the relationship was of a friendly nature it was entirely a relationship of two separate business enterprises where General Motors did not occupy a superiority or wield an influence over the distributor or dealer by reason of a confidence and trust imposed in it. (2645).

"It is also contended by General Motors that it set up minimum working capital requirements only to insure profitable and efficient operation and to assure that the facilities, management and resources of its Distributors and Dealers were adequate to expand the market for the Buick automobile, to service the cars sold and to create and preserve good will for the Buick product and that this was its prerogative under its written agreement."

The Court then charged the jury with respect to the applicable law where a confidential relationship is found to exist and what facts must be found before a confidential relationship is established (Tr. Vol. VI, pp. 2399-2400):

"The law says that where a confidential relationship exists that there arises a duty of loyalty and fair dealing which includes a duty of full disclosure of all matters directly bearing upon the subject matter of their dealings, particularly where the matter lies peculiarly within the knowledge of one party and the other has no reasonably available means of access to that knowledge.

"You will be mindful, however, that to establish a relationship of trust and confidence

upon the violation of which fraud may be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. There must be something which impels or induces the trusting party to relax the care and vigilance which he otherwise should and ordinarily would, exercise and there (2646) must be a continuing dependence.

"It is the contention of the plaintiff that a relationship of trust and confidence existed. It is for you to decide upon all the evidence exactly what that relationship was. In law, a relationship of trust and confidence extends to all matters as to which confidence is reposed and in which superiority and influence resulting from such confidence may be exercised by one person over another. The impulse of man to trust one in whom he has reposed his confidence is not ignored by the law. If you are satisfied that a relationship of trust and confidence did exist between the parties to this suit, you must then inquire whether in fact the overall policy of General Motors with reference to continuance of the existing distributorship was of such a nature as fell within the orbit of the relationship of trust and confidence, and should have been disclosed to Anderson Buick Company by General Motors in good conscience and fair dealing as that is measured in the thinking of honest and honorable men in the light of their relationship.

"The suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation, that such fact does (2647) not exist. You must, however, first be satisfied that such an obligation to speak on the matter is present by reason of a duty arsing from the relationship of the parties."

Appellant made no objection and took no exception to any of the above quoted portions of the charge.

C. Appellant's Requested Instruction

The instruction requested by appellant consisted of two sentences and covered two separate points: (1) the nature of the relationship between the parties and (2) the scope of the duty of disclosure required by the alleged relationship (Tr. Vol. II, p. 415):

> "[1] You are instructed that the relationship between the defendant General Motors Corporation as manufacturer and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof.
>
> "[2] Such a duty includes the duty of General Motors Corporation to disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant."

The Court could not and did not give appellant's proposed charge with respect to the nature of the relationship between the parties because, as stated by the Court (Tr. Vol. II, p. 518),

> "The evidence presented a sharp conflict as to the manner in which plaintiff corporation and defendant operated in their dealings. This conflict also extended to the matters on which plaintiff claimed it sought or received help, assistance, advice or guidance from the defendant."

Accordingly, the Court left this disputed question of fact to the jury (Tr. Vol. VI, p. 2400):

> "It is the contention of the plaintiff that a relationship of trust and confidence existed. It is for you to decide upon all the evidence exactly what that relationship was."

The Court could and did give, in language substantially identical with that proposed by appellant, the second portion of appellant's proposed instruction relating to the scope of the duty of disclosure required by a relationship of "trust and confidence." In this connection the Court charged (Tr. Vol. VI, p. 2399):

> "The law says that where a confidential relationship exists that there arises a duty of loyalty and fair dealing which includes a duty of full disclosure of all matters directly bearing upon the subject matter of their dealings, particularly where the matter lies peculiarly within the knowledge of one party and the other has no reasonably available means of access to that knowledge."

The Court further charged (Tr. Vol. VI, p. 2400):

> "If you are satisfied that a relationship of trust and confidence did exist between the parties to this suit, you must then inquire whether in fact the over-all policy of General Motors with reference to continuance of the existing distributorship was of such a nature as fell within the orbit of the relationship of trust and confidence, and should have been disclosed to Anderson Buick Company * * *."

Appellant made no objection and took no exception to this basic portion of the Court's charge. Appellant thus conceded that, even if a relationship of "trust and confidence" was found to exist, the further question of whether the asserted policy fell within the area where trust and confidence was reposed was a question of fact for the jury.

Appellant's basic contention on this appeal, as stated in Specification of Error No. I (Br. p. 45) and argued at pages 45-81 thereof, is that

> "The Court erred in failing to instruct the jury that General Motors owed Anderson, as a matter of law, a duty to disclose its *distributorship termination policy.*" (Emphasis supplied).

This basic contention and appellant's entire argument in connection therewith is based upon a false assumption. It assumes that appellant requested the Court to instruct the jury that appellee was obligated, as a matter of law, to disclose its alleged "distributorship termination policy." However, as pointed out above, appellant did not, in fact, make any such request. On the contrary, both by failing to request such an instruction and by its acquiescence in the instruction given by the Court, appellant conceded that, even if a relationship of trust and confidence was found to exist, the question of whether the alleged distributorship termination policy "was of such a nature as fell within the orbit of the relationship of trust and confidence and should have been disclosed" was a question of fact for the jury.

It is not open to appellant now to assert that the Court erred in failing to give an instruction never requested—i.e., that appellee was required, as a matter of law, affirmatively to notify appellant of its alleged "distributorship termination policy." Rule 51 of the Federal Rules of Civil Procedure expressly provides:

> "* * * No party may assign as error the giving or failing to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to

which he objects and the grounds of his objection."

Accordingly, on this appeal, the only point properly raised by appellant's Specification of Error No. I is the claim that the Court erred in refusing to charge that a relationship of "trust and confidence" had been established as a matter of law.

D. Appellant's Argument

The Contention That the Court Should Resolve the Factual Issues

Appellant advances the proposition (Br. pp. 54-57) that the question of whether a duty to disclose exists "should be determined by the Court as a matter of law." Appellant's statement of the proposition, as well as its further contention that it is for the Court to determine the nature of "the relationship existing between the parties," begs the question. It assumes (a) that the ultimate facts with respect to the nature of the relationship are wholly uncontroverted and (b) that no conflicting inferences can be drawn from the uncontroverted facts. In the instant case there is no possible basis for a contention that the facts with respect to the nature of the relationship were uncontroverted, much less for a contention that the only inferences which could be drawn from the facts were that a "confidential relationship" existed.

If appellant is actually contending, as it appears to be, that in a fraud case the Court should take over the function of the jury and (a) first determine the actual nature of the relationship by itself resolving the controverted facts and the inferences to be drawn from any uncontroverted facts and (b) then

determine whether the facts found by the Court created a duty to disclose, appellant is proposing a complete abandonment of the concept of the respective functions of a Court and jury, as it exists in our system of jurisprudence.

The only authority cited in support of appellant's contention is a quotation of the last paragraph of an article published in 1936 in the Texas Law Review. The article, devoted largely to analysis of vendor-vendee cases, proposed the adoption of a new theoretical standard to determine whether liability should be imposed for non-disclosure. The standard proposed was "the standard man" and "what the man of ordinary moral sensibilities would have done." The paragraph quoted by appellant proposed that "the standard devised in this paper" should be applied by the Court, rather than the jury, because the Court has "the benefit of all the experience of his predecessors." As far as can be ascertained, neither the proposed new "standard" nor its proposed method of application has yet been adopted by any court.

Not only does appellant cite no cases in support of its contention that, in an action for fraud, the existence of an alleged "confidential relationship" should be determined, as a manner of law, by the Court, but the very cases cited in appellant's brief expressly recognize that this is a question of fact. Thus, in *Selle v. Wrigley,* 233 Mo. App. 43, 116 S.W. 2d 217 (1938), cited on pages 58, 59, 75 and 76 of appellant's brief, the court stated (116 S.W.2d. 217, 221):

> "A confidential relationship may be said to exist where two persons stand in such a relation as that, while it continues, confidence is

necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other. * * * 'The only question is, does such a relation in fact exist.'

* * *

" 'It is in each case a question of fact. The law regards the real rather than the nominal, condition.'

* * *

"The question in such case is always whether or not trust is reposed."

The fact that the existence of a "confidential relationship" is a question of fact and, as such, to be determined by the jury is universally recognized.

"It is for the jury to determine whether a confidential relation existed between the person making the representation and the one to whom it was made . . . " 37 C. J. S. Fraud § 124.

"Likewise to be determined as issues of fact are the questions whether a party charged in a civil action with fraud concealed facts and whether under the circumstances it was his duty to disclose more than he did disclose or not to have said what he did say. A conflict in the evidence concerning the termination of a confidential relationship is to be determined by the jury." 24 Am. Jur. Fraud § 292.

" 'Whether a duty to speak exists in a given case is a question depending upon the peculiar facts involved, such as the nature of the transaction, the mutual relation of the parties, and their respective knowledge and means of knowledge.' " *Kelley v. Von Herberg,* 184 Wash. 165, 174-75, 50 P.2d 23, 27 (1935).

Where a party's right to rely on a false statement is predicated on a confidential relationship between the parties, the existence of the relationship is a

question of fact for the jury. *Burke v. Mayer,* 105 Wash. 1, 6, 177 Pac. 662, 663 (1919).

As recently as April 6, 1959, the Supreme Court of the United States had occasion to pass upon the relative functions of court and jury in determining the actual nature of an asserted relationship. *Baker v. Eexas & Pacific R. Co.,* .... U.S. ...., 3 L. ed. 2d 756, 758 (1959). In an action brought under the Federal Employers' Liability Act to recover damages for the death of petitioner's decedent, the petitioner asserted and the respondent railroad denied the existence of an employer-employee relationship. The trial court declined to submit the issue to the jury, holding as a matter of law that the asserted relationship did not exist. The Court held that this was error and said:

> "Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. * * * 'The very essence of . . . (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' "

Appellant's Basic Contention

Appellant reaches its basic contention upon this appeal at page 57 of its brief, where it asserts that "The relationship in the instant case between Anderson and General Motors was such that there was a duty to disclose as a matter of law." The argument in support of the assertion appears at pages 57-81 of its brief.

Reduced to its essence, the argument may be stated in the form of a syllogism, with the major premise, the minor premise and the conclusion all quoted from pages 57-58 of appellant's brief:

Major: "A duty to disclose exists between parties occupying a confidential relationship."

Minor: "General Motors occupied a confidential relationship to Anderson."

Conclusion: "There was a duty to disclose as a matter of law."

Appellant's Major Premise

Appellant's major premise consists of the broad generalization that "a duty to disclose exists between parties occupying a confidential relationship." Implicit in the generalization is the necessity of first determining (a) whether a "confidential relationship" did, in fact, exist between the parties involved and (b) whether the particular matter in question did, in fact, lie within the area of any "trust and confidence" which were actually reposed.

Appellant first cites a miscellaneous group of five cases as illustrating the breadth of the concept of a fiduciary or confidential relationship. *Stieber v. Vanderlip,* 136 Neb. 862, 287 N.W. 773 (1939); *Wilson v. Rentie,* 124 Okla. 37, 254 Pac. 64 (1926); *Voellmeck v. Harding,* 166 Wash. 93, 6 P.2d 373 (1931); *Klika v. Albert Wenzlick Real Estate Co.,* 150 S.W. 2d 18 (1941); *Selle v. Wrigley,* 233 Mo. App. 43, 116 S.W. 2d 217 (1938).

None of these cases involved the question of whether the Court should have charged the jury that a "confidential relationship" had been established as a matter of law. The *Stieber* and *Wilson* cases were suits in equity. The *Selle* case involved

question of fact for the jury. *Burke v. Mayer,* 105 Wash. 1, 6, 177 Pac. 662, 663 (1919).

As recently as April 6, 1959, the Supreme Court of the United States had occasion to pass upon the relative functions of court and jury in determining the actual nature of an asserted relationship. *Baker v. Eexas & Pacific R. Co.,* .... U.S. ...., 3 L. ed. 2d 756, 758 (1959). In an action brought under the Federal Employers' Liability Act to recover damages for the death of petitioner's decedent, the petitioner asserted and the respondent railroad denied the existence of an employer-employee relationship. The trial court declined to submit the issue to the jury, holding as a matter of law that the asserted relationship did not exist. The Court held that this was error and said:

> "Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. * * * 'The very essence of . . . (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' "

Appellant's Basic Contention

Appellant reaches its basic contention upon this appeal at page 57 of its brief, where it asserts that "The relationship in the instant case between Anderson and General Motors was such that there was a duty to disclose as a matter of law." The argument in support of the assertion appears at pages 57-81 of its brief.

Reduced to its essence, the argument may be stated in the form of a syllogism, with the major premise, the minor premise and the conclusion all quoted from pages 57-58 of appellant's brief:

Major: "A duty to disclose exists between parties occupying a confidential relationship."

Minor: "General Motors occupied a confidential relationship to Anderson."

Conclusion: "There was a duty to disclose as a matter of law."

Appellant's Major Premise

Appellant's major premise consists of the broad generalization that "a duty to disclose exists between parties occupying a confidential relationship." Implicit in the generalization is the necessity of first determining (a) whether a "confidential relationship" did, in fact, exist between the parties involved and (b) whether the particular matter in question did, in fact, lie within the area of any "trust and confidence" which were actually reposed.

Appellant first cites a miscellaneous group of five cases as illustrating the breadth of the concept of a fiduciary or confidential relationship. *Stieber v. Vanderlip,* 136 Neb. 862, 287 N.W. 773 (1939); *Wilson v. Rentie,* 124 Okla. 37, 254 Pac. 64 (1926); *Voellmeck v. Harding,* 166 Wash. 93, 6 P.2d 373 (1931); *Klika v. Albert Wenzlick Real Estate Co.,* 150 S.W. 2d 18 (1941); *Selle v. Wrigley,* 233 Mo. App. 43, 116 S.W. 2d 217 (1938).

None of these cases involved the question of whether the Court should have charged the jury that a "confidential relationship" had been established as a matter of law. The *Stieber* and *Wilson* cases were suits in equity. The *Selle* case involved

question of fact for the jury. *Burke v. Mayer,* 105 Wash. 1, 6, 177 Pac. 662, 663 (1919).

As recently as April 6, 1959, the Supreme Court of the United States had occasion to pass upon the relative functions of court and jury in determining the actual nature of an asserted relationship. *Baker v. Eexas & Pacific R. Co.,* .... U.S. ...., 3 L. ed. 2d 756, 758 (1959). In an action brought under the Federal Employers' Liability Act to recover damages for the death of petitioner's decedent, the petitioner asserted and the respondent railroad denied the existence of an employer-employee relationship. The trial court declined to submit the issue to the jury, holding as a matter of law that the asserted relationship did not exist. The Court held that this was error and said:

> "Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. * * * 'The very essence of . . . (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' "

Appellant's Basic Contention

Appellant reaches its basic contention upon this appeal at page 57 of its brief, where it asserts that "The relationship in the instant case between Anderson and General Motors was such that there was a duty to disclose as a matter of law." The argument in support of the assertion appears at pages 57-81 of its brief.

Reduced to its essence, the argument may be stated in the form of a syllogism, with the major premise, the minor premise and the conclusion all quoted from pages 57-58 of appellant's brief:

Major: "A duty to disclose exists between parties occupying a confidential relationship."

Minor: "General Motors occupied a confidential relationship to Anderson."

Conclusion: "There was a duty to disclose as a matter of law."

Appellant's Major Premise

Appellant's major premise consists of the broad generalization that "a duty to disclose exists between parties occupying a confidential relationship." Implicit in the generalization is the necessity of first determining (a) whether a "confidential relationship" did, in fact, exist between the parties involved and (b) whether the particular matter in question did, in fact, lie within the area of any "trust and confidence" which were actually reposed.

Appellant first cites a miscellaneous group of five cases as illustrating the breadth of the concept of a fiduciary or confidential relationship. *Stieber v. Vanderlip,* 136 Neb. 862, 287 N.W. 773 (1939); *Wilson v. Rentie,* 124 Okla. 37, 254 Pac. 64 (1926); *Voellmeck v. Harding,* 166 Wash. 93, 6 P.2d 373 (1931); *Klika v. Albert Wenzlick Real Estate Co.,* 150 S.W. 2d 18 (1941); *Selle v. Wrigley,* 233 Mo. App. 43, 116 S.W. 2d 217 (1938).

None of these cases involved the question of whether the Court should have charged the jury that a "confidential relationship" had been established as a matter of law. The *Stieber* and *Wilson* cases were suits in equity. The *Selle* case involved

the sufficiency of a pleading. In the *Voellmeck* and *Klika* cases, jury verdicts in favor of the plaintiffs were sustained.

The relationship between the parties to the instant case was not remotely comparable to the relations involved in any of the five cases cited. They involved relationships between an incapacitated eighty year old woman and her daughter and legal advisors (*Stieber*); an illiterate elderly negro couple and their trusted business and legal advisor (*Wilson*); a dominant corporate executive and an employee to whom he had been "benefactor, counsellor, master and friend" (*Voellmeck*); an inexperienced woman and a real estate company which purported to act as her confidential advisor (*Klika*); and an orphan boy and a farmer who induced him to work for nothing by a false pretense of legal adoption (*Selle*).

Appellant next cites and quotes from a group of nine cases in support of the general proposition that "a principal and agent have a duty to each other to make a full disclosure as to all matters material to the agency" (Br. pp. 61-68). None of these cases has any bearing upon the issues here presented because the relationship between the parties to the instant case was not that of principal and agent. (See *supra,* pp. 27-29).

None of the nine cases has any bearing on the single issue raised by appellant's Specification of Error No. I, i.e. whether the Court erred in refusing to charge that the relationship between the parties "gave rise to a duty of mutual trust, confidence and loyalty." None has any bearing on the question of whether the relationship between the

parties was in fact, one of "trust and confidence," and, if so, whether appellee's alleged policy did, in fact, lie within the area of any trust and confidence actually reposed.

Four of the nine cases cited (Br. pp. 61-63) deal with fraudulent representations made by or to real estate agents in the course of dealings with their principals. *Kruse v. Miller,* 143 Cal. App. 2d 656, 300 P.2d 855 (1956); *Walter v. Libby,* 72 Cal. App. 2d 138, 164 P. 2d 21 (1945); *McLeod v. Gaither,* 94 Fla. 55, 113 So. 687 (1927); *Louis Schlesinger Co. v. Wilson,* 22 N. J. 576, 127 A. 2d 13 (1956).

The other five cases cited (Br. pp. 63-68) are equally inapplicable. Three cases are cited in support of the assertion that "the relationship of a manufacturer to a distributor includes that of principal and agent." *Champion Spark Plug Co. v. Automobile Sundries Co.,* 273 Fed. 74 (C.C.A. 2, 1921); *Pugh v. A. D. Bothne Co.,* 178 Ia. 601, 159 N.W. 1030 (1916); *Twohig v. Lawrence Warehouse Company,* 118 Fed. Supp. 322, 224 F. 2d 493 (C.C.A. 8, 1955).

Whether the relationship between a manufacturer and a distributor does or does not include that of principal and agent, depends entirely upon the nature of the contract and of the facts involved in each particular case. In the *Champion Spark Plug* case the contract between the parties expressly constituted the plaintiff the "sales agent" of the defendant. The sole question involved in the *Pugh* case was whether a local automobile dealer and his place of business constituted an "agency" of the defendant manufacturer within the meaning of an Iowa service-of-process statute, so that jurisdiction over

the manufacturer could be acquired by service upon the dealer. No question of "confidential relationship" or "duty of disclosure" was either involved or considered. The *Twohig* case (erroneously cited as *John v. Baltimore and O. R. Co.*) did not involve a distributor at all but a purchasing agent who was defrauded by collusion between his insolvent principal and the defendant warehouse company.

Two cases are cited (Br. pp. 66-68) in support of the assertion that, "regardless how the distributorship relationship is classified", a manufacturer and a distributor have "an obligation to deal with the other in good faith." *Smyth Sales, Inc. v. Petroleum Heat & Power Co.,* 128 F. 2d 697 (C.C.A. 3, 1942); *E. H. Taylor, Jr. & Sons v. Julius Levin Co.,* 274 Fed. 275 (C.C.A. 6, 1921). The generalization is, of course, so broad that it is without specific meaning. It is difficult to think of any relationship where the parties are not required to deal in "good faith." Even the simplest contract requires the parties to comply in good faith with their contractual obligations. In the two cases cited, the defendants were guilty of flagrant and fraudulent breaches of their contractual obligations.

Appellant's Minor Premise

At pages 68-81 of its brief, appellant finally addresses itself to the problem of attempting to establish its minor premise, i.e. that the existence of a "confidential relationship"' between the parties to this action was established as a matter of law by the uncontroverted evidence. The attempt takes two forms: 1. The citation of and quotation from another series of cases which have no bearing upon

the question of whether the appellant in the instant case did, in fact, repose its "trust and confidence" in appellee and whether appellee's alleged policy did, in fact, fall within the area of any such trust and confidence. 2. A repetition of various factual contentions made by appellant, which were contradicted by the evidence and rejected by the jury.

1. *The "Partnership" Contention*

Appellant first argues that a confidential or fiduciary relationship existed between the parties because they were "partners in progress," that such a relationship "is closely akin to a partnership in law" and that "the law applying is, of course, well settled.' (Br. p. 70). None of the four cases cited has any relevance to the instant case where the relationship between the parties was neither a partnership nor "closely akin to a partnership." (See *supra,* pp. 9-10, 27-29).

2. *The "Domination and Control" Contention*

Plaintiff next argues that a fiduciary or confidential relationship existed between the parties because "General Motors completely dominated and controlled Anderson" (Br. p. 71). The argument consists of (a) quotations from two cases, (b) a reference to Appendix A to appellant's brief and (c) a reference back to plaintiff's distorted "Statement of the Case."

(a) Appellant's citation of and quotation from *United States v. General Motors Corp.* 121 F. 2d 376 (C.C.A. 7, 1941) manifestly have no bearing upon the claim that appellant was "completely dominated and controlled" by appellee. Appellant here

makes no contention that it was ever requested, much less required, to handle its car financing through General Motors Acceptance Corporation. Equally unavailing is appellant's attempt to cast itself in the role of the orphan boy who was defrauded by the farmer in *Selle v. Wrigley,* already commented on at pages 54-55, *supra.*

(b) Appellant's attempt to support its essential contention that the uncontroverted evidence in the instant case established, as a matter of law, the existence of a "confidential relationship" between the parties hereto by referring to the material set forth in the Appendix to its brief is utterly without justification. The reports quoted are not evidence in this case. They would not have been admissible is appellant had attempted to introduce them upon the trial. Appellant characterizes the entire eight-page Appendix as "Congressional Findings." The first four pages are excerpts from a Committee report. The entire balance of the Appendix does not contain any statement by any member of Congress and consists of a series of excerpts from a so-called "Staff Report" made by employees of a Subcommittee and was never adopted by the Subcommittee which employed them.

(c) Plaintiff's purported summary of the "uncontroverted evidence" claimed to have established, as a matter of law, the existence of "complete domination and control" and a relationship of "trust and confidence" (Br. pp. 73-77) is simply a repetition of the distorted version of the facts contained in appellant's purported "Statement of the Case." The baseless character of these contentions has already been discussed at length. (See *supra,* pp. 14-38).

3. *The "Superior Knowledge" Contention*

Appellant next cites a group of four cases in support of the contention that, even in the absence of a "confidential relationship," appellee was obligated to notify appellant of its alleged policy because of its "superior knowledge." (Br. p. 77). *Villalon v. Bowen,* 70 Nev. 456, 273 P.2d 409 (1954); *Kuhn v. Gottfried,* 103 Cal. App. 2d 80, 229 P.2d 137 (1951); *Everett v. Gilliland,* 47 N. M. 269, 141 P.2d 326 (1943); *Oates v. Taylor,* 31 Wn.2d 898, 199 P.2d 924 (1948).

Even if appellant had requested the Court to so instruct the jury, which it did not, no support for such a request is to be found in any of the four cases cited by appellant. In none of these cases were the facts involved remotely comparable in the instant case.

The *Villalon* case involved a woman who fraudulently represented herself to be the widow of a decedent and concealed the fact of a prior undissolved marriage at the time of her purported marriage to the decedent. She gained possession of the assets of the estate by having decedent's will (which left his estate to another) set aside on the ground that it had been executed prior to her purported marriage to decedent and accordingly had been revoked by operation of law. When the fraud was discovered by the special administrator of the decedent's estate, he sued and recovered the assets of the estate.

In the *Kuhn* case the defendant doctor, in connection with the sale of a medical practice, made false and fraudulent representations concerning the com-

pleteness of his medical records, the value of his equipment and the nature of his medical practice and concealed the existence of pending litigation with another doctor over a prior sale of the same practice. The buyer brought suit to cancel the note which he had given in payment for the practice and the relief sought was granted.

In the *Everett* case the seller of mortgaged realty, after undertaking to advise the buyer of all the facts concerning the mortgage indebtedness, fraudulently concealed the fact that interest was owing to the mortgagee and tendered the buyer a deed which falsely stated the amount due under the mortgage. The buyer recovered his damages in an action based upon the fraud.

In the *Oates* case the defendant superintendent of a building corporation failed to advise the plaintiff of the precarious financial condition of the corporation at the time the superintendent sought and obtained from the plaintiff an advance payment on the building contract for a house which the corporation was building for him. It was held that the superintendent was *not* guilty of any fraud because there was no fiduciary relationship between the parties and they were dealing at arm's length.

4. *The "Representations and Promises" Contention*

Appellant next cites three cases in support of the proposition (Br. p. 79-80) that appellee was obligated to notify appellant of its alleged policy because of alleged "promises and representations." *Ikeda v. Curtis,* 43 Wn.2d 449, 261 P.2d 684 (1953);

Kuhn v. Gottfried, supra, p 63; and *Everett v. Gilliland, supra,* p. 63.

The *Ikeda* case furnishes no more support for appellant's contention than do the *Kuhn* and *Everett* cases which have already been discussed (*supra* pp. 63-64). In the *Ikeda* case the plaintiff, an untutored Japanese, contracted to buy the good will, furniture and lease of what appeared to be a lucrative and legitimate small hotel business but was actually a house of prostitution. The seller's agent falsely represented that the "hotel" had a substantial number of permanent guests and the seller herself induced the buyer to purchase the business by affirmatively stating that the monthly income was from $1,900 to $2,300 and fraudulently concealing the fact that the large income resulted from her operation of the property as a bawdy house. The buyer recovered his damages in an action for fraud.

5. *The "Other Factors" Contention*

Under the caption "other factors" (Br. p. 81), appellant merely repeats the contention that, in reliance upon wrongful non-disclosure of appellee's alleged distributorship termination policy, it invested substantial sums in distributorship facilities, borrowed $500,000 to obtain "working capital" and suffered "economic ruin" — contentions that are without basis in fact (See *supra,* pp. 10-11) and were rejected by the jury.

Appellant has failed to cite a single case which furnishes the slightest support for its contention that, despite the basic conflict between appellant's contentions and the oral testimony and documen-

tary evidence presented by appellee, the Trial Court should have usurped the function of the jury and held that the existence of a confidential relationship had been established as a matter of law. Appellant's Specification of Error No. I is wholly baseless.

III

SINCE THE JURY FOUND THAT APPELLANT'S EXECUTION OF THE WRITTEN AGREEMENTS WAS NOT INDUCED BY FRAUD OR BUSINESS COMPULSION, THEY CONSTITUTE A COMPLETE BAR TO THIS ACTION, AS CHARGED BY THE COURT WITH THE APPROVAL OF APPELLANT.

Appellant asserts (Br. pp. 84-87) that "the written dealership contracts do not preclude recovery by Anderson on a fraud theory." In support of the assertion appellant cites seven cases illustrating the rule that where a party has, in fact, been induced to enter into a contract by means of fraudulent representations, proof of the fraud is not barred by the provisions of the contract, either in an action for recission or for damages. None of the cases is here relevant because in the instant case the jury found that appellant was not, in fact, induced to enter into any of its agreements by fraud.

There is not and cannot be any genuine issue on this appeal concerning the proposition that, in the absence of any fraud in the inducement, the written agreements between the parties constitute an absolute bar to appellant's asserted cause of action for fraud. As hereinafter pointed out, the Court so charged without objection or exception by appellant and the jury found that there was, in fact, no fraud in the inducement.

From the very inception of this litigation, appellant recognized the impossibility of recovery on the theory of justifiable reliance upon alleged misrepresentations or non-disclosure unless some way could be found to avoid the express provisions and legal effect of the written agreements into which it had entered during the years 1936 to 1952, inclusive. Appellant's recognition of the fact that it could not take any action in reliance upon the assumption that its distributorship agreement would be continued indefinitely or that any new distributorship agreement would be offered after the expiration of the current agreement appears with crystal clarity from a memorandum written by Mr. Anderson himself on January 22, 1947, which stated: (Def. Ex. A-33; Tr. Vol. IV, pp. 1303-04).

> "It should be made very clear that Anderson Buick Company has a contract that runs for only two years beginning October 15, 1945. This contract definitely terminates October 15, 1947 with no recourse for Anderson Buick Company other than such consideration as covered in the GM contract covering unexpired leases and leasehold improvements. It would seem that we are well within our rights to protect ourselves because of the type of contract that we have."

Appellant sought to avoid the bar of the written agreements by contending that the provisions of the agreements were not binding upon it for two reasons: (1) because all of the agreements entered into after 1936 had been entered into "involuntarily" and as a result of "business compulsion"; and (2) because appellant had been induced to enter into all of the agreements by fraud on the part of appellee.

The claim that its highly profitable agreements had never been binding upon appellant because it had been forced to enter into them by business compulsion was advanced in each of the three successive complaints (Tr. Vol. I, pp. 9, 307; Vol. II, p. 402). The claim that appellant had been induced to enter each of the agreements by fraud was first advanced after the close of the case and while the Court, in consultation with counsel, was formulating its instructions to the jury. At appellant's request, and over appellee's objections (Tr. Vol. VI, pp. 2251-53), the Court agreed to submit to the jury not only the original claim of business compusion but also the belated claim of fraud in the inducement.

In its instructions to the jury, the Court first set forth the contentions of appellee in this connection (Tr. Vol. VI, pp. 2414-15) and then the contentions of appellant (Tr. Vol. VI, pp. 2415-16).

After having stated the respective contentions of the parties, the Court then came to the all important question of the legal effect of the explicit provisions of the written agreements in the event that the jury rejected appellant's contention that it had been induced to enter into them by business compulsion and by fraud. On this crucial point the court charged as follows (Tr. Vol. VI, p. 2417):

> *"I charge you that * * * these agreements constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements or that plaintiff sustained any injury as a result of the alleged non-disclosure* unless you are convinced that these an-

> nual agreements signed by Anderson Buick Company were involuntary acts on its part or acts done in reliance upon a fraudulent representation or a fraudulent non-disclosure and were therefore neither a surrender of its right to rely upon a representation made to it by (2668) General Motors as to its policy to renew the distributorship or of the right to believe that General Motors had fully and fairly disclosed to it all matters which in fair dealing General Motors should have disclosed because of the relationship between them."

Appellant made no objection and took no exception to the foregoing instructions of the Court on this basic and fundamental issue. Appellant thus conceded that if the jury should find that appellant had *not* entered into the agreements as a result of business compulsion or fraud, the express provisions of these written agreements constituted, as a matter of law, an absolute and complete bar to any claim for damages based upon asserted reliance upon any alleged misrepresentation or non-disclosure by appellee.

Both by its general verdict for appellee and by its answers to Interrogatory No. 10 (Tr. Vol. II, pp. 502-03), the jury found that appellant had *not* entered into any of the agreements because of business compulsion or fraud. Having properly conceded the correctness of the Court's charge that, in the event of such a finding by the jury,

> "these agreements constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements or that plaintiff sustained any injury as a result of the alleged non-disclosure",

appellant cannot now be heard to argue, as it does on page 84 of its brief, that "the written dealership contracts do *not* preclude recovery by Anderson on a fraud theory." Any such contention is barred by the express provisions of Rule 51, Fed. R. Civ. P.

Thus, even if it be assumed, contrary to the fact, that any misrepresentation had been made, whether by affirmative statements or by non-disclosure, the written agreements are a complete bar to the action under the charge of the Court, acquiesced in by appellant, and the verdict of the jury.

IV.

THE COURT DID NOT ERR IN CHARGING THE JURY THAT NO RECOVERY COULD BE BASED UPON AN ALLEGED MISREPRESENTATION IN JULY 1947.

APPELLANT'S SPECIFICATION OF ERROR NO. II IS WITHOUT MERIT.

Appellant contends, under Specification of Error No. II (Br. p. 82), that the judgment below should be reversed because of the Court's alleged error in charging the jury that no recovery could be based upon an alleged misrepresentation in July 1947. The contention is without merit for a number of reasons.

A. Appellant's Claim of Error is Barred by Rule 51, Fed. R. Civ. P.

The Court found, as a matter of law, that appellant's own version of Mr. Nash's telephone conversation with Mr. Anderson in July 1947, failed to establish any actionable misrepresentation and that there

was not even an alleged actionable representation until November 9, 1951 (Tr. Vol. VI, p. 2475). In its charge to the jury, the Court set forth in detail Mr. Anderson's version of the conversation (Tr. Vol. VI, p. 2393) as well as Mr. Nash's conflicting version (Tr. Vol. VI, pp. 2393-94). The Court then charged that while no recovery could be based thereon, the jury could and should consider the conflicting versions in connection with their consideration of the similarly conflicting versions of the conversation of November 9, 1951 (Tr. Vol. VI, p. 2401).

Appellant made no objection and took no exception to the Court's instructions in this respect and, accordingly, is barred by the provisions of Rule 51, Fed. R. Civ. P. from any claim that the Court erred in so charging the jury. While appellant took an exception to an initial ruling made by the Court for the benefit of appellant's counsel during the course of appellant's own case (Tr. Vol. IV, p. 1573), appellant abandoned its contention that the July 1947 conversation constituted an independent basis of recovery by failing to object to the instructions given to the jury at the close of the entire case after appellee's evidence on the matter had been presented.

The requirement of Rule 51 that a party must make an objection "stating distinctly the matter to which he objects and the grounds of his objection" is for the protection of the Court as well as the parties. *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.,* 181 F.2d 880 (8 Cir. 1950), cert. den. 340 U. S. 865 (1950); *Husky Refining Co. v. Barnes,* 119 F.2d 715, 717 (1941); *Thiel v. Southern Pac. Co.,* 149 F.2d 783, 788, rev'd on other grounds 328 U.S. 217

(1946); *Woodworkers Tool Works v. Byrne,* 191 F.2d 667, 676 (1951).

In the instant case, not only did appellant fail to make any objection to the Court's instructions to the jury, but even at the time of the Court's initial ruling during the course of appellant's case, appellant failed to state the grounds of its objections thereto. It is furthermore to be noted that, in addition to appellant's failure to object to the instructions, the Statement of Points filed by appellant on June 6, 1958, in accordance with the requirements of Rule 17(6) of this Court, similarly failed to include any assignment of error on the part of the Trial Court in this connection.

B. Appellant's Claim of Error Is Academic

Even if it were to be assumed, contrary to the fact, that Mr. Nash had been guilty of a misrepresentation of fact in July 1947, the Court's charge that appellant could not recover any damages therefor did not constitute reversible error. The matter was rendered wholly academic by the verdict of the jury. By its general verdict in favor of appellant, the jury necessarily found (a) that appellant's version of the July 1947 conversation was not true; (b) that Mr. Nash was without authority to make any representations or commitments with respect to the continuance of appellant's distributorship; (c) that there was no intent on the part of appellee to deceive or defraud appellant; (d) that in view of the express provisions of the written agreements, appellant was not justified in relying upon any alleged representations or non-disclosure with respect to the continuance of appellant's distributorship;

and (e) that appellant had not, in fact, acted in reliance upon any alleged misrepresentation or nondisclosure on the part of appellee.

Completely dispositive, in and of itself, of any claim of prejudicial error is the fact that the Court, with the complete agreement of appellant, charged the jury (Tr. Vol. VI, p. 2417) that the written agreements between the parties "constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements", unless the jury should find that the agreements themselves had been executed as a result of business compulsion or fraud. Both by its general verdict and by its answers to the interrogatories, the jury found that appellant's execution of the agreements had not been so induced. (Tr. Vo. II, pp. 502-03). Accordingly, under the Court's charge, acquiesced in by appellant, any claim for damages based upon asserted reliance upon the alleged misrepresentation of July 1947, was barred, as a matter of law, by the written agreements between the parties. (See Point III, *supra,* pp. 66-70).

C. Appellant's Own Testimony Failed to Establish Any Actionable Misrepresentation

Appellant's own testimony (Tr. Vol. III, pp. 895-98) failed to establish any misrepresentation of existing fact by Mr. Nash. The Court held that, even accepting appellant's own version of the conversation, it was not actionable, nor did it furnish any basis for a claim that Mr. Nash had been guilty of a fraudulent misrepresentation for which appellee was answerable in damages. The statement that Mr.

Nash did not think Anderson had anything to worry about as long as he did a good job was not and did not purport to be anything more than an honest expression of opinion by Mr. Nash.

At that time, as found by the jury, appellee had neither formulated nor adopted any policy which provided for the termination of appellant's distributorship (Tr. Vol. II, p. 501). Subsequent to July 14, 1947 appellee entered into six new distributorship agreements with appellant. It was not until more than four years later that a decision was made to change the method of distribution in the Northwest area and announced at the Portland meeting of July 10, 1952 (Tr. Vol. VI, pp. 2095-97, 2197-2201; Tr. Vol. V, pp. 1974-75).

V.

THE CONTENTION, UNDER APPELLANT'S SPECIFICATION OF ERROR NO. III, THAT APPELLEE WAS NOT ENTITLED TO A DIRECTED VERDICT OR TO DISMISSAL, IS ACADEMIC.

As appellant states (Br. p. 87), this is an appeal from a judgment based solely upon the verdict rendered by the jury. Accordingly, the question of appellee's right to a directed verdict or to dismissal is not in issue upon this appeal.

The opinion which the Court read to the jury, after entry of the verdict (Tr. Vol. VI, pp. 2468-79), makes it entirely clear that if the jury's verdict had been for the appellant, the Court would have been compelled to set it aside as against the manifest weight of the evidence and contrary to law. The Court said:

"Your verdict entirely accords with my view of the case. I want to commend you for your conscientious consideration."

VI.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT APPELLANT WAS PRECLUDED FROM CLAIMING THAT THE AGREEMENT OF NOVEMBER 1, 1952 WAS ENTERED INTO IN RELIANCE UPON APPELLEE'S ALLEGED MISREPRESENTATION AND NON-DISCLOSURE.

APPELLANT'S SPECIFICATION OF ERROR NO. IV IS WITHOUT MERIT.

Appellant's Specification of Error No. IV (Br. p. 89) is that the Court erred in charging the jury as follows (Tr. Vol. VI, pp. 2419-20):

> "I charge you that since the final agreement of November 1, 1952 was entered into after July 10, 1952—the date of the Portland meeting —there may be no claim by plaintiff that this agreement was signed in reliance upon the alleged misrepresentation or because of the alleged non-disclosure."

Appellant's claim of error is manifestly baseless.

At the Portland meeting of July 10, 1952, appellant was notified that it would not, under any circumstances be continued as a distributor after June 30, 1953 and that any relations after that date between the parties would be solely on a dealership basis.

As a matter of simple logic, as inexorable as simple arithmetic, appellant could not have signed the agreement of November 1, 1952 in reliance upon a

representation that its distributorship *would* be continued indefinitely or in reliance upon non-disclosure of a policy to terminate the distributorship, when appellant had admittedly been notified four months earlier that its distributorship would *not* be continued indefinitely and *would* terminate on June 30, 1953.

Appellant's claim that it did not know of appellee's alleged "policy" prior to October, 1953 has no bearing upon the complete correctness of the instruction complained of. The sole point covered by the instruction was the fact that appellant could not have entered into the agreement of November 1, 1952 in reliance upon a mistaken belief, fraudulently induced by appellee, that its distributorship would be continued indefinitely — regardless of whether the fraud consisted of an affirmative representation that the distributorship *would* be indefinitely continued or a failure to disclose an intention *not* to continue the distributorship indefinitely.

Furthermore, the jury having found no fraud in the inducement of the agreements entered into by appellant *before* July 10, 1952, when it was advised that its distributorship would not be continued beyond June 30, 1953, could not conceivably have found fraud in the inducement of a contract entered into *after* appellant had been specifically so advised. (Tr. Vol. II, pp. 502-03).

Finally, appellant's claim of error in this respect is rendered wholly academic by the further basic finding of the jury that the relationship between the parties was not, in fact, one of "trust and confidence" or of such a character as to require appellee to notify appellant of its alleged policy. If

no such obligation existed, appellant, as a matter of law, could not have entered into the agreement of November 1, 1952 in justifiable reliance upon the non-existence of the alleged policy. As a matter of law, such non-disclosure could not have constituted fraud in the inducement.

VII.

SPECIFICATION OF ERROR NO. V IS WITHOUT MERIT.

The only question raised by this specification is whether the Court had authority to enter an order *nunc pro tunc* ordering a copy of the minutes as contemplated by Local Rule 56(g)(4).

While the Court had jurisdiction of the case, there can be no doubt of its authority to enter this order. As the Court stated (Tr. Vol. II, p. 526):

> "*The transcript of the minutes of the trial were necessary for the use of the Court.* Each trial day found the minutes on the bench and frequent reference to them was made during trial by the Court, to the knowledge of counsel. When ruling upon various motions which involved the legal sufficiency of the evidence presented, the Court referred to the trial minutes. When passing upon requests to charge and in the preparation of the charge itself, the Court had frequent occasion to examine the testimony. This was particularly so when the Court prepared its statement of the undisputed facts, as well as when the analysis of the testimony was written on matters as to which there was a conflict."

CONCLUSION

Since there was no error of law and the verdict of the jury is supported by substantial evidence, the judgment appealed from should be affirmed.

Respectfully submitted,

HOLMAN, MICKELWAIT, MARION,
BLACK & PERKINS
J. PAUL COIE
1006 Hoge Building
Seattle 4, Washington

HENRY M. HOGAN
DANIEL BOONE
E. J. MCGRATTY, JR.
3044 West Grand Boulevard
Detroit 2, Michigan
Attorneys for Appellee.